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No. 09-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. Lokesh Vuyyuru,
Petitioner,

v.

GOPNATH JADHAV, M.D.; SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LIMITED; COLUMBIA/HCA JOHN RANDOLPH, INCORPORATED; PETERSBERG HOSPITAL COMPANY, LLC; CAMERON FOUNDATION, A VIRGINA NON-PROFIT CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A) Whether the United States Court of Appeals for the Fourth Circuit in the instant case of *United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D. et al.*, misconstrued the rules of law established by this Court regarding the test for determining when a relator's claims brought under the federal False Claims Act, 31 U.S.C. § 3730, are "based upon" a public disclosure under the Act's jurisdiction-removing provision at § 3730(e)(4), and decided an important question of federal law in a manner that conflicts with the Supreme Court's decisions in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470-72 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) when this Appeals Court held that the relator must prove that he was the source of the public disclosure of similar false claims allegations.

B) Whether the United States Court of Appeals for the Fourth Circuit in the instant case of *United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D. et al.*, in effectively holding that a relator's false claims allegations, to be "based upon" a public disclosure under the federal False Claims Act's jurisdiction-removing provision at § 3730(e)(4), need not be actually derived from the public disclosure but only be similar to such public disclosure, decided an important question of federal law that has not been, but should be, settled by this court, and decided this question in a manner that conflicts with decisions of other circuit courts.

C) Whether the United States Court of Appeals for the Fourth Circuit in the instant case of *United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav,*

M.D. et al. decided an important question of federal law that has not been, but should be, settled by this court regarding when a relator's false claims action generally and a relator's jurisdictional allegations specifically are "clearly frivolous" under the federal False Claims Act's provision for an award of attorneys' fees to a prevailing defendant at § 3730(d)(4).

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The decision by the United States Court of Appeals for the Fourth Circuit entered below is reported at *United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D.*, 555 F.3d 337 (4th Cir. 2009). (App. A)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion affirming the District Court's decision on February 12, 2009. Rehearing was denied by Order dated April 10, 2009. (App. E)

28 U.S.C. § 1254(1) is the statutory provision which confers on this Court jurisdiction to review on a *Writ of Certiorari* the judgment and orders of the United States Court of Appeals for the Fourth Circuit in question in this case.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729 [*31 USCS § 3729*]. If the Attorney General finds that a person has violated or is violating

section 3729 [*31 USCS § 3729*], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 [*31 USCS § 3729*] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

* * *

(d) Award to qui tam plaintiff.

* * *

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

* * *

> (4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730.

STATEMENT OF THE CASE

The District court had federal question subject matter jurisdiction under 28 U.S.C. § 1331 over Petitioner's federal claims which were brought pursuant to the federal False Claims Act (FCA), 31 U.S.C. § 3730; and had subject matter jurisdiction over these claims pursuant to 31 U.S.C. § 3732.

On March 13, 2006, Relator Vuyyuru filed this *qui tam* action under the FCA, and thereafter amended

the complaint three times. Relator Vuyyuru ultimately named Gopinath Jadhav, M.D. (Dr. Jadhav), Southside Gastroenterology Associates, Ltd. (the SGA Practice), Petersburg Hospital Company, L.L.C., The Cameron Foundation, and Columbia/HCA John Randolph, Inc. as defendants (collectively Defendants). The Third Amended Complaint (TAC) alleges various claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and Virginia state law.

Relator Vuyyuru alleged three separate counts under the FCA. In the first count, Relator Vuyyuru alleged Defendants knowingly presented, or caused to be presented and filed, a false or fraudulent claim for payment or approval with the United States Government, in violation of 31 U.S.C. § 3729(a)(1). (J.A. 139). In the second count, Relator Vuyyuru alleged Defendants knowingly made or used or caused to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Government, in violation of 31 U.S.C. § 3729(a)(2). (J.A. 139). In the third count, Relator Vuyyuru alleged that Defendants conspired to defraud the United States government in violation of 31 U.S.C. § 3729(a)(3) by getting false or fraudulent claims allowed or paid to the damage of the United States' government. (J.A. 140). Relator Vuyyuru sought damages and fines together with attorneys' fees and costs. (J.A. 142).

The TAC alleges that Dr. Jadhav is a gastroenterologist, who practiced medicine in Virginia at Southside Regional Medical Center (SRMC) and John Randolph Medical Center (JRMC), through the SGA Practice. Dr. Jadhav was the president and sole

shareholder of the SGA Practice. As part of his practice, Dr. Jadhav performed medical procedures such as colonoscopies, endoscopies, esophago gastro duodonoscopies (EDG), percutaneous endoscopic gastrostomy tube placements (PEG tube placement), and biopsies.

Relator Vuyyuru asserts in the TAC that Defendants fraudulently billed the government, through the Medicare and Medicaid programs, for unnecessary or incomplete medical procedures performed by Dr. Jadhav. The TAC allegations include the following specifics: (1) Dr. Jadhav, while performing colonoscopies, routinely took an unnecessary biopsy of the Ileocecal Valve (IC Valve) when he was unable to find a polyp; (2) Dr. Jadhav unnecessarily performed an EDG on a patient and a PEG tube replacement on consecutive days, when the two procedures could have been performed on the same day for a lower rate; (3) In the first half of 2002, Dr. Jadhav performed an unnecessary colonoscopy and biopsy of the IC Valve on a sixty-five year old female; (4) In August 1997, Dr. Jadhav performed an unnecessary endoscopy on a seventy-two year-old female; (5) On November 27, 2001, Dr. Jadhav performed an unnecessary EDG with biopsy on a seventy-two year old female, and thirteen days later performed an unnecessary colonoscopy with biopsy on the same patient; and (6) On January 3, 2000, Dr. Jadhav performed an unnecessary colonoscopy on a seventy-one year old female. The TAC alleges that Dr. Jadhav performed such unnecessary procedure for the sole purpose of enhancing his income and that of SRMC and JRMC. (J.A. 133).

The TAC alleges that Dr. Jadhav frequently billed for the procedure of a colonoscopy and upper-endoscopy when Dr. Jadhav failed to complete the procedure. (J.A. 134). The TAC alleges that Defendant Dr. Jadhav for a period of nearly 10 years failed to dictate the required consult note before billing, making minor notations only in the chart, while billing for a level 3 to 5 consult, and at SRMC Dr. Jadhav routinely and in most cases did not provide a dictation for consults and failed to perform general multi-system examinations failing to follow federal agency guidelines since 1997 for which he billed or caused to be billed to the United States Government as though these guidelines were being met. (J.A. 136)

On October 6, 2006, Defendants moved to dismiss the Third Amended Complaint under Federal Rule of Civil Procedure 12(b)(1), contending that the jurisdictional bar set forth in 31 U.S.C. § 3730(e)(4) barred Relator Vuyyuru's FCA claims. Defendants attached evidentiary exhibits to their Consolidated Memorandum of Law in support of their motion, which they asked the district court to consider in resolving the jurisdictional question.

In support of their motion to dismiss for lack of subject matter jurisdiction, Defendants contended that the allegations in the Third Amended Complaint were based upon and derived from publicly disclosed information, and that Relator Vuyyuru could not establish that he was entitled to the "original source" exception to § 3730(e)(4)(A)'s public disclosure jurisdictional bar. Defendants contended that the allegations in the Third Amended Complaint were

derived from numerous articles appearing in the Virginia Times newspaper prior to Relator Vuyyuru's initial filing of this action. Relator was the publisher of the Virginia Times. Defendants attached the articles as exhibits to their Consolidated Memorandum of Law in support of their Rule 12(b)(1) motion.

The Third Amended Complaint sets forth a basis for Relator Vuyyuru's knowledge separate from the public disclosure. Vuyyuru alleges that he learned that Dr. Jadhav had performed unnecessary biopsies by reviewing Dr. Jadhav's medical records and from medical staff who had observed Dr. Jadhav's practices. Relator Vuyyuru further alleges that he discovered that Dr. Jadhav failed to complete colonoscopy procedures (despite billing for complete procedures) through his review of Dr. Jadhav's charts and through his own subsequent examinations of a number of Dr. Jadhav's patients. Relator Vuyyuru specifically alleges that during these examinations, he discovered lesions, polyps, and cancer which would have been detected had Dr. Jadhav in fact performed complete colonoscopy procedures.

Relator Vuyyuru also presented the district court with declarations that include evidence regarding the manner in which Relator Vuyyuru obtained knowledge of the fraudulent acts alleged in the Third Amended Complaint. In a declaration filed in support of his original complaint, Relator Vuyyuru testifies that his knowledge of the complaint's allegations was based upon personal observation, information provided to him by medical staff, patients, patients' families, and his review of medical records. In his supplemental declaration, Relator Vuyyuru further clarifies the basis of knowledge

of the complaint's allegations separate and apart from the public disclosure of these claims in the media. Specifically, he testifies that from 1997 through 2005, he personally monitored and investigated Dr. Jadhav's work. Relator Vuyyuru makes clear that he personally reviewed Dr. Jadhav's medical charts and specifically observed from this review that Dr. Jadhav had a practice of regularly performing unnecessary biopsies of the IC-valve. Relator Vuyyuru further testifies that in his investigation of Dr. Jadhav's medical charts, he observed that Dr. Jadhav never performed a biopsy of the IC-valve when he was able to bill for removing a polyp or other legitimate pathology, a practice which Relator Vuyyuru contends constitutes evidence that the biopsies of the IC-valve were done solely to increase billing. Relator Vuyyuru further testifies that he interviewed pathologists at both JRMC and SRMC, who confirmed Dr. Jadhav's practices regarding IC-valve biopsies. Vuyyuru also states in his supplemental declaration that he learned about Dr. Jadhav's allegedly fraudulent billing from his personal interviews of the individuals who performed billing services for Dr. Jadhav as well as through the subsequent colonoscopy procedures Relator Vuyyuru performed on several of Dr. Jadhav's patients during which he found polyps and tumors that Dr. Jadhav would have observed had complete colonoscopy procedures been performed on these patients.

The transcript of the January 26, 2007 hearing reveals that Relator Vuyyuru's counsel stated that Vuyyuru was suspended from SRMC in March 2004, not 2003 as the Defendants asserted. Vuyyuru's supplemental declaration states that he was on the medical staff at SRMC until 2004. (J.A. 428).

In his declaration of October 24, 2006, Relator Vuyyuru asserts that he reported these allegations of fraud to the FBI (J.A. 364) ("[i]n and around 2002, 2003, and 2004, I spoke with FBI Agents Vanosten and Irons regarding the improper medical procedures and Medicaid and Medicare Fraud by Dr. Jadhav, SRMC and JRMC"); the Attorney General's Office (J.A. 364) ("in and around 2002 and 2003, I spoke with the Attorney General's Office with a representative responsible for investigating Medicaid Fraud regarding the improper medical procedures by Dr. Jadhav and billing fraud at both SRMC and JRMC"); and the Center for Quality Health Care (J.A. 364) ("in 2003, I filed a complaint with the Board of Medicine against Dr. Jadhav regarding unnecessary procedures, but was directed to Center for Quality Health Care").

In a declaration by Relator Vuyyuru filed after the district court's ruling on the motion to dismiss but prior to the ruling on Defendants' request for attorney fees, Vuyyuru provides more detail regarding his contact with the government regarding these allegations. Relator Vuyyuru states in this declaration that he began his discussions with the United States Attorney in October 1998 and met with several FBI agents from 1998 to 2005. He further asserts that in 2003, he was given a letter providing him certain "protections" related to his cooperation with the government. (J.A. 662).

The District Court held an oral argument hearing on January 26, 2007 regarding Defendants' Motion to Dismiss and on March 28, 2007 granted the Defendants' Rule 12(b)(1) motion to dismiss finding that Relator Vuyyuru's claims were based upon the public disclosures

in the Virginia Times and that Vuyyuru had failed to show he was an original source. Relator Vuyyuru timely appealed the District Court's dismissal, for lack of subject matter jurisdiction, of his Third Amended Complaint to the Fourth Circuit. He also appealed the district court's award of attorneys' fees and costs to one of the defendants. The Fourth Circuit on February 12, 2009 affirmed both District Court decisions, the appeals of which had been consolidated. A detailed dissenting opinion was filed by Judge Reidinger. A timely Petition for Rehearing En Banc was filed by Vuyyuru which was denied on April 10, 2009. This Petition for Certiorari was thereafter timely filed.

ARGUMENT ON REASONS FOR GRANTING THE PETITION

A) THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT MISCONSTRUES THE TEST ESTABLISHED BY THIS COURT FOR DETERMINING WHEN A RELATOR'S CLAIMS BROUGHT UNDER THE FEDERAL FALSE CLAIMS ACT, 31 U.S.C. § 3730, ARE "BASED UPON" A PUBLIC DISCLOSURE UNDER THE ACT'S JURISDICTION-REMOVING PROVISION AT § 3730(e)(4), AND IN HOLDING THAT THE RELATOR MUST PROVE THAT HE WAS THE SOURCE OF THE PUBLIC DISCLOSURE CONFLICTS WITH THIS COURT'S DECISIONS IN *ROCKWELL INT'L CORP. v. UNITED STATES*, 549 U.S. 457 (2007).

The Fourth Circuit majority held (Opinion at 350-51) that Vuyyuru had not overcome the Defendants' evidence of similarity between the publicly disclosed allegations in the Virginia Times and his FCA false claims allegations in the TAC because a relator, in this case Lokesh Vuyyuru, in order to do so had to produce evidence to show that the relator was, in fact, the source of the newspaper articles in question. This holding is contrary to the Supreme court's decision in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470-72 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007). Under *Rockwell*, whether Relator Vuyyuru was the source of the newspaper articles is not relevant. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470-72 127 S.Ct.

1397, 167 L.Ed.2d 190 (2007). What matters is whether the relator has produced evidence to show that his allegations were not "actually derived from" this public disclosure. Imposing this requirement that the relator actually be the source of the public disclosure is at odds with the Supreme Court's holding in *Rockwell* that the FCA statutory phrase "information on which the allegations are based" (see 31 U.S.C. § 3730(e)(4)(B)) refers to information on which the relator's allegations are based, not information on which publicly disclosed allegations are based. *See Rockwell*, 549 U.S. at 470-72. *See* Dissenting Opinion below, *United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D.*, 555 F.3d 337, 359 (4th Cir. 2009) (Reidinger, District Judge, Dissenting).

The Supreme Court should grant certiorari here because this Fourth Circuit rule, set out in the *Vuyyuru* decision below — that in order to bring a *Qui Tam* action under the federal False Claims Act to recover federal funds taken by a corporation or private individual under false pretenses, the relator on behalf of the United States, or the United States suing directly, must show that the relator was the source of the public disclosure — will prevent the filing and prosecution of legitimate non-parasitic *Qui Tam* actions and as a result cause significant harm to the public interest by preventing recovery of millions, and likely billions, of dollars of federal funds taken under false pretenses.

B) THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, IN EFFECTIVELY HOLDING THAT A RELATOR'S FALSE CLAIMS ALLEGATIONS, TO BE "BASED UPON" A PUBLIC DISCLOSURE UNDER THE FEDERAL FALSE CLAIMS ACT'S JURISDICTION-REMOVING PROVISION AT § 3730(e)(4), NEED NOT BE ACTUALLY DERIVED FROM THE PUBLIC DISCLOSURE BUT ONLY BE SIMILAR TO THAT PUBLIC DISCLOSURE, DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND DECIDED THIS QUESTION IN A MANNER THAT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS.

The Fourth Circuit, until this decision in Vuyyuru below, had adopted the rule that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994). The majority in the *Vuyyuru* decision below departed from this rule when it concluded that "the district court logically reasoned that '[t]he remarkable similarities between the news article and the allegations contained in [paragraphs 20 and 27 of the Third Amended Complaint] are significant proof that the latter are 'actually derived' from the former.' " Vuyyuru Opinion at 350 (quoting J.A. 558). *See United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D.*, 555 F.3d 337, 359 (4th Cir. 2009) (Reidinger, District Judge, Dissenting).

However, as the Dissent in *Vuyyuru* below explains, there is no logic to the assertion that mere similarity between allegations in a news article and allegations in an FCA complaint means that the plaintiff obtained the information on which the complaint is based from the news article. Other logical possibilities are that the author of the news article obtained information from the plaintiff; that the author of the news article and the plaintiff obtained their information from common sources independently; or that the author of the news article and the plaintiff had separate reliable sources of the information.

The Circuits are split on how this issue should be addressed as the Dissent explained in Vuyyuru below:

> finding allegations to be "based upon" a public disclosure requires more than a finding of similarity between the public disclosure and the complaint's allegations. "[I]t is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic." *Id.* As the Siller Court noted, this Court's interpretation of the "based upon" requirement differs from other circuits. Id. ("We are aware . . . that other circuits have not embraced this interpretation of the phrase, assuming instead that an action is based upon a public disclosure of allegations if its allegations are identical or similar to those already publicly disclosed."). While

> other circuits may disagree with this approach, Siller remains the law in this circuit. Accordingly, I would hold that the district court committed clear error in finding that the similarities between Relator Vuyyuru's allegations and the newspaper articles constituted proof that the allegations were "based upon" a prior public disclosure.

United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D., 555 F.3d 337, 359 (4th Cir. 2009) (Reidinger, District Judge, Dissenting). *And see, United States v. Board of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533 (9th Cir. 1998), *cert. den.* 526 U.S. 1066 (1999) (If, at time relator files qui tam complaint, allegations or transactions of complaint have been publicly disclosed, then allegations are "based upon" publicly disclosed information). *Also see, United States ex rel. McKenzie v. Bellsouth Telcoms.*, 123 F.3d 935 (6th Cir. 1997) (criticizing the 4th Cir. Decision in *Siller*); *United States ex rel. Mistick PBT v Housing Auth.*, 186 F.3d 376 (3rd Cir. 1999) (same); *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002) (same); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3rd Cir. 2005) (same). *But see, United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986) (criticized in *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870 (D.C. Cir. 1999); *United States ex rel. Rost v. Pfizer, Inc.*, (2006, DC Mass) 446 F Supp.2d. 6 (D.C. Mass. 2006) (District Court adopted "minority rule" and held that a FCA complaint is "based upon" public disclosure only when allegations supporting action are "derived from" public disclosure; that this

interpretation is supported by plain language of statute and ordinary meaning of phrase and better serves polices of FCA).

In Vuyyuru, it should have been clear to both the District Court and the Fourth Circuit from a review of the face of the TAC and the news articles that relator Vuyyuru alleged numerous material details about the Defendants' alleged false claims that were not provided in the news articles. This alone should have been sufficient for both courts to conclude that Vuyyuru's FCA allegations and claims were not based upon the public disclosures in the Virginia Times because they were not "derived from those disclosures."

The Supreme Court should grant certiorari here because this Fourth Circuit rule, set out in the *Vuyyuru* decision below, to the effect that a FCA complaint can be found to be "based upon" a public disclosure" by virtue of mere similarity of the complaint allegations to those in a news article, will prevent the filing and prosecution of legitimate non-parasitic *Qui Tam* actions and as a result cause significant harm to the public interest by preventing recovery of millions, and likely billions, of dollars of federal funds taken under false pretenses.

C) THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT REGARDING WHEN A RELATOR'S FALSE CLAIMS ACTION GENERALLY AND A RELATOR'S JURISDICTIONAL ALLEGATIONS SPECIFICALLY ARE "CLEARLY FRIVOLOUS" UNDER THE FEDERAL FALSE CLAIMS ACT'S PROVISION FOR AN AWARD OF ATTORNEYS' FEES TO A PREVAILING DEFENDANT AT § 3730(d)(4).

The Fourth Circuit decision below affirming the District Court's award of attorney fees to a prevailing defendant, based on a finding that relator Vuyyuru's assertion of federal jurisdiction under the FCA was not just in error and was not even just frivolous but was "clearly frivolous" is so extreme that the Supreme Court should not wait for further development of splits in the decisions on this issue among the Circuits. This Court should act now to make the proper rule of law clear for all the Circuits to avoid a potentially huge chilling effect on potential FCA Qui Tam plaintiffs and a potentially huge reduction in the recovery of federal funds by the United States under the FCA.

It is difficult to imagine, given the detailed allegations by relator Vuyyuru in the TAC and his several declarations in the record that the two courts below could find that he was clearly frivolous in asserting that his claims were not based on news articles that were published long after he had brought his allegations to

the FBI and other agencies, and in asserting that he, as a doctor with access to medical records and personnel in question and who had consulted both in investigating these FCA claims, was an original source of the information on which his claims were based. The Dissenting Opinion below finds not only that Vuyyuru's assertions in these regards were not frivolous, they were actually correct. The Dissenting Opinion is carefully researched and well reasoned and it is hard to conceive of a rationale to sanction a litigant for filing a "clearly frivolous" action when a member of the Court of Appeals panel hearing the case found a sound basis for that litigant actually prevailing on the jurisdiction issue in question.

> Because I believe the District Court's dismissal was in error, I would also vacate the district court's award of attorneys' fees to the Defendants. Moreover, even if the finding of a lack of subject matter jurisdiction were sustained, I would still reverse the award of attorneys' fees. Attorneys' fees may be awarded under § 3730(d)(4) upon a finding "that the claim of the person bringing the action was clearly frivolous. . . ." 31 U.S.C. § 3730(d)(4). For all of the reasons set forth above, I simply do not believe that Relator Vuyyuru's jurisdictional allegations are "clearly" frivolous.
>
> There is no question that the record presented to the district court was convoluted, due in no small part to the voluminous and oftentimes inartfully drafted filings, and it must have appeared at times

> that this action was little more than a grudge match between the Relator and the Defendants. The presentation of the facts may have been awkward, and there may well be some substantive flaws in the Relator's claims. At bottom, however, this is a case about a physician who undertook to investigate the medical procedures and billing practices of another physician and the medical facilities at which he worked and found what may well constitute Medicare and Medicaid fraud. Even if such claims may ultimately prove to be frivolous, such frivolousness falls short of the standard of being "clear" based on this record. I would, therefore, vacate the award of attorneys' fees as having been an abuse of discretion.

United States of America ex rel. Lokesh Vuyyuru v. Gopinath Jadhav, M.D., 555 F.3d 337, 363 (4th Cir. 2009) (Reidinger, District Judge, Dissenting). For the above reasons, to protect the vital public interests the Congress sought to promote in enacting the FCA, this Court should grant this Petition and issue a clear decision correcting this extreme decision by the Fourth Circuit panel below which threatens to prevent the filing of numerous meritorious FCA qui tam actions that could recover millions if not billions of dollars for the federal treasury at a critical time in the nation's economic history.

CONCLUSION

For all the foregoing reasons, Petitioner Vuyyuru respectfully requests that the Supreme Court of the United States grant his Petition for a Writ of Certiorari and clarify the applicable law for the nation's courts on these important federal statutory questions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED FEBRUARY 12, 2009

UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

Nos. 07-1455, 07-1922

UNITED STATES of America ex rel. Lokesh VUYYURU, Plaintiff-Appellant,

v.

Gopinath JADHAV, M.D.; Southside Gastroenterology Associates, Limited; Columbia/HCA John Randolph, Incorporated; Petersburg Hospital Company, LLC; Cameron Foundation, a Virginia non-profit corporation, Defendants-Appellees,

and

Sealed Defendant 1; Sealed Defendant 2; Sealed Defendant 3; Sealed Defendant 4; Sealed Defendant 5; Community Health Systems Professional Services, Incorporated; Petersburg Hospital, Incorporated, Defendants,

v.

Sealed Movant; United States of America; John Reynolds, Doctor, Movants.

Appendix A

United States of America ex rel. Lokesh Vuyyuru,
Plaintiff-Appellant,

v.

Gopinath Jadhav, M.D.; Southside Gastroenterology Associates, Limited; Columbia/HCA John Randolph, Incorporated; Petersburg Hospital Company, LLC; Cameron Foundation, a Virginia non-profit corporation, Defendants-Appellees,

and

Sealed Defendant 1; Sealed Defendant 2; Sealed Defendant 3; Sealed Defendant 4; Sealed Defendant 5; Community Health Systems Professional Services, Incorporated; Petersburg Hospital, Incorporated, Defendants,

v.

Sealed Movant; United States of America; John Reynolds, Doctor, Movants.

Argued: Oct. 27, 2008
Decided: Feb. 12, 2009

Appendix A

OPINION

HAMILTON, Senior Circuit Judge:

Relator Lokesh B. Vuyyuru (Relator Vuyyuru) appeals the district court's dismissal of, for lack of subject matter jurisdiction, his Third Amended Complaint, which complaint alleges various claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and Virginia state law. He also challenges the district court's award of attorneys' fees and costs to one of the defendants. We affirm.

I.

On March 13, 2006, Relator Vuyyuru filed this *qui tam* action under the FCA. After amending the complaint three times, Relator Vuyyuru ultimately named Gopinath Jadhav, M.D. (Dr. Jadhav), Southside Gastroenterology Associates, Ltd. (the SGA Practice), Petersburg Hospital Company, L.L.C., The Cameron Foundation, and Columbia/HCA John Randolph, Inc. as defendants (collectively Defendants).[1]

Of relevance in the present appeal, in his Third Amended Complaint, Relator Vuyyuru alleged three separate counts under the FCA. In the first count, Relator Vuyyuru alleged Defendants "knowingly presented, or caused to be presented and filed, a false or fraudulent claim for payment or approval with the United States

1. The United States of America (the government) timely notified the district court that it declined to intervene as a plaintiff, thus leaving Relator Vuyyuru to proceed in the action as the sole plaintiff. *See* 31 U.S.C. § 3730(b)(4)(B).

Government," in violation of 31 U.S.C. § 3729(a)(1). (J.A. 139). In the second count, Relator Vuyyuru alleged Defendants "knowingly made [or] used or caused to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Government," in violation of 31 U.S.C. § 3729(a)(2). (J.A. 139). In the third count, Relator Vuyyuru alleged that Defendants "conspired to defraud the United States government in violation of 31 U.S.C. § 3729(a)(3) by getting false or fraudulent claims allowed or paid to the damage of the United States' government." (J.A. 140). With respect to these three counts, Relator Vuyyuru sought an undetermined amount "duly trebled in addition to a fine of not less than $5,000 per violation and not more than $10,000 together with attorneys' fees and costs." (J.A. 142).

According to the Third Amended Complaint, Dr. Jadhav is a gastroenterologist, who practices medicine in Virginia at Southside Regional Medical Center[2] (SRMC) and John Randolph Medical Center[3] (JRMC),

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2. According to the Third Amended Complaint, defendant The Cameron Foundation, a Virginia non-profit corporation, is the successor in interest to the Hospital Authority of the City of Petersburg, which hospital authority operated SRMC until its sale in or about 2003 to defendant Petersburg Hospital Company, LLC, which limited liability company then owned and operated SRMC during the remaining time relevant to the Third Amended Complaint.

3. According to the Third Amended Complaint, defendant Columbia/HCA John Randolph, Inc., a Virginia corporation, owned and operated JRMC during all times relevant to the Third Amended Complaint.

through the SGA Practice. Dr. Jadhav is the president and sole shareholder of the SGA Practice. As part of his practice, Dr. Jadhav performed medical procedures such as colonoscopies, endoscopies, esophago gastro duodonoscopies (EDG), percutaneous endoscopic gastrostomy tube placements (PEG tube placement), and biopsies.

We note, as did the district court, that the Third Amended Complaint is inartfully drafted. Nonetheless, we state with fair assurance that the crux of Relator Vuyyuru's claims under the FCA is that Defendants fraudulently billed the government, through the Medicare and Medicaid programs, for unnecessary or incomplete medical procedures performed by Dr. Jadhav. With respect to the nature of the alleged unnecessary medical procedures, the Third Amended Complaint alleges: (1) through March 2005, Dr. Jadhav, while performing colonoscopies, routinely took an unnecessary biopsy of the Ileocecal Valve (IC Valve) when he was unable to find a polyp; (2) Dr. Jadhav unnecessarily performed an EDG on a patient and a PEG tube replacement on consecutive days, when the two procedures could have been performed on the same day for a lower rate; (3) during sometime in the first half of 2002, Dr. Jadhav performed an unnecessary colonoscopy and biopsy of the IC Valve on a sixty-five year old female; (4) in August 1997, Dr. Jadhav performed an unnecessary endoscopy on a seventy-two year-old female; (5) on November 27, 2001, Dr. Jadhav performed an unnecessary EDG with biopsy on a seventy-two year old female, and thirteen days later performed an

unnecessary colonoscopy with biopsy on the same patient; and (6) on January 3, 2000, Dr. Jadhav performed an unnecessary colonoscopy on a seventy-one year old female. With respect to each alleged unnecessary medical procedure just listed in (2) through (6), the Third Amended Complaint alleges that Dr. Jadhav performed such unnecessary procedure "for the sole purpose of enhancing his income and that of **SRMC and JRMC.**" (J.A. 133) (emphasis added).

With respect to the procedures allegedly not completed by Dr. Jadhav, but for which Defendants allegedly fraudulently billed the government, the Third Amended Complaint offers no information regarding individual patients. Rather, it alleges in general that "Dr. Jadhav frequently billed for the procedure of a colonoscopy and upper-endoscopy when Dr. Jadhav failed to complete the procedure." (J.A. 134). Moreover, almost as an aside, the Third Amended Complaint alleges:

> Defendant Dr. Jadhav for a period of nearly 10 years failed to dictate the required consult note before billing, making minor notations only in the chart, while billing for a level 3 to 5 consult. At SRMC (different than his practice at JRMC) [ ] Dr. Jadhav routinely and in most cases did not provide a dictation for consults and failed to perform general multi-system examinations failing to follow CMS guidelines since 1997 for which he billed or caused to be

> billed to the United States Government as though the CMS guidelines were being met.

(J.A. 136).[4]

Of relevance to the issues in the present appeal, on October 6, 2006, Defendants moved to dismiss the Third Amended Complaint under Federal Rule of Civil Procedure 12(b)(1), contending that the jurisdictional bar set forth in 31 U.S.C. § 3730(e)(4) operated to bar Relator Vuyyuru's FCA claims.[5] Defendants attached evidentiary exhibits to their Consolidated Memorandum of Law in support of such motion, which exhibits they asked the district court to consider in resolving their jurisdictional challenge. In relevant part, § 3730(e)(4) provides as follows:

> **(e) Certain Actions barred.—**
>
> * * *
>
> **(4)(A)** No court shall have jurisdiction over an action under this section based upon the public disclosure of

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4. CMS is an abbreviation for the Centers for Medicare and Medicaid Services, which is the agency of the Department of Health and Human Services responsible for administering the Medicare program.

5. At the same time, Defendants moved to dismiss the Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Such motion is not at issue on appeal.

> allegations or transactions . . . from the news media, unless . . . the person bringing the action is an original source of the information.
>
> **(B)** For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Id.

In support of their motion to dismiss for lack of subject matter jurisdiction, Defendants contended that the allegations in the Third Amended Complaint were derived from publicly disclosed information, and that Relator Vuyyuru did not carry his burden of establishing he was entitled to the "original source" exception to § 3730(e)(4)(A)'s public disclosure jurisdictional bar.

With respect to the public disclosure issue, Defendants contended that the allegations in the Third Amended Complaint were derived from numerous articles appearing in the Virginia Times newspaper prior to Relator Vuyyuru's initial filing of this action. At all times relevant to the allegations of the Third Amended Complaint, Relator was the publisher of the Virginia

Times. Defendants attached the articles as exhibits to their Consolidated Memorandum of Law in support of their Rule 12(b)(1) motion, which memorandum of law stated the following on the subject:

> On March 30, 2005, roughly a year before Plaintiff filed his Complaint, the *Virginia Times* newspaper published a front-page article titled "Alleged insurance, quality-of-care fraud at SRMC." (A copy of the article is attached as Ex. G.) The article, written by Dorothy Rowley, a staff writer for the newspaper, described an allegedly fraudulent scenario involving IC-Valve procedures and colonoscopies allegedly performed in less than five minutes by Dr. Jadhav [at] SRMC. *See id.* Notably, Ms. Rowley cited "[n]ursing sources who worked with Jadhav" as providing the factual details contained in the article. *Id.* The Virginia Times also published a flurry of other articles alleging fraud by Dr. Jadhav, SRMC, and JRMC, all of which asserted improper Medicare and Medicaid billing. (Copies of the Articles are attached as Ex. H.).

(J.A. 174-75). Defendants also pointed the district court to an excerpt from a deposition given by Relator Vuyyuru in a state court malpractice action against him and Columbia/HCA John Randolph, Inc. (owner and operator of JRMC) just ten days after he initially filed the present *qui tam* action. When asked during the

deposition whether he had provided or been a source for several articles in the Virginia Times, Relator Vuyyuru responded:

> No, they may ask—the reporters, if they have something, they don't understand something in medicine or something like that, they may ask me some kind of medical expertise, they may ask sometimes, but I don't recall all the particular details, you know, I have medical discussions with reporters. But most of the time, they publish these articles talking to various people, various hospital people and all this stuff.
>
> If you want, you have to go directly to the reporters about that. I'm only the publisher.

(J.A. 318).

Relator Vuyyuru's response to Defendants' Rule 12(b)(1) motion focused almost exclusively upon the original source exception to § 3730(e)(4)(A)'s public disclosure jurisdictional bar. With respect to his deposition testimony, Relator Vuyyuru argued that Defendants were taking such testimony out of context. As far as extrinsic evidence goes, Relator Vuyyuru attached two items of extrinsic evidence to his written response. Notably, prior to the morning of the subsequent hearing on Defendants' Rule 12(b)(1) motion, Relator Vuyyuru did not request discovery of any kind in order to respond to Defendants' Rule 12(b)(1) motion.

Appendix A

The first attachment to Relator Vuyyuru's written response was his own sworn declaration, in which the following statements arguably went to his burden to establish subject matter jurisdiction: (1) "Long before the March 30, 2005 front-page article titled 'Alleged insurance, quality-of-care fraud at SRMC', I was speaking with the FBI and [ ] several Assistant U.S. Attorney Generals and other government officials describing the fraudulent scenario involving IC-Valve procedures and colonoscopies performed in less than five minutes by Dr. Jadhav." (J.A. 363); (2) "In and around 2002, 2003 and 2004, I spoke with FBI Agents Vanosten and Irons regarding the improper medical procedures and Medicaid Fraud by Dr. Jadhav, SRMC and JRMC." (J.A. 364); (3) "Additionally, in and around 2002 and 2003, I spoke with the Attorney General's Office with a representative responsible for investigating Medicaid Fraud regarding the improper medical procedures by Dr. Jadhav and billing fraud at both SRMC and JRMC. . . ." *Id.*; (4) he "alleged to . . . the FBI . . ." that Dr. Jadhav had performed an unnecessary biopsy upon his (Relator Vuyyuru's) patient Donald F. Case, Jr. and "falsified by creating a history and physical (H & P) in the patient's chart after the procedure," and that such "conduct was part of a consistent pattern by Dr. Jadhav resulting in many false claims to Medicare and Medicaid...." (J.A. 364-65); and (5) "As director of endoscopy at JRMC, I investigated Dr. Jadhav and presented the data in multiple meetings from 2001 to 2005, including 'who, what, when, where, and how' to administration at JRMC. . . ." *Id.* at 365.

Appendix A

The second attachment is a copy of a page of the Virginia Times, publishing a letter, dated April 22, 2005, by Donald F. Case, Jr., to the Virginia Times, in which Mr. Case explains that Dr. Jadhav performed a colonoscopy upon him without his permission. Notably, Mr. Case stated that he was in his "50's. . . ." (J.A. 366).

Approximately two months after Defendants moved to dismiss the Third Amended complaint for lack of subject matter jurisdiction, Relator Vuyyuru served subpoenas on several pathologists seeking records related to colonoscopy with biopsy procedures, performed or reviewed by Dr. Jadhav and the respective pathologist since January 1, 1997. Defendants moved to quash the subpoenas, *inter alia*, on the basis that the parties had not yet conducted a Rule 26(f) discovery conference, *see* Fed.R.Civ.P. 26(d), (f), and on the basis that the subpoenas constituted an improper attempt by Relator Vuyyuru to investigate his false claim allegations before establishing subject matter jurisdiction. As part of the motion, Defendants requested entry of a protective order precluding Relator Vuyyuru "from further attempts at obtaining discovery from any source prior to the Court's ruling on Defendants' Motions to Dismiss [Relator Vuyyuru's] claims pursuant to Rules 12(b)(1) and 12(b)(6) and the parties' Rule 26(f) conference. . . ." (J.A. 393-94). Relator Vuyyuru filed a response, requesting the motion be denied. A fair reading of Relator Vuyyuru's response makes clear that he served the subpoenas on the pathologists in order to seek evidence to support the merits of his FCA claims, not to seek evidence to support the jurisdictional allegations of the Third Amended Complaint.

During this back and forth over the subpoenas, this action was assigned to United States District Judge Richard L. Williams. As best we can discern from the appellate briefs and the record below, Judge Williams (through his law clerk) informed the parties that he would not issue a pretrial order, which sets forth discovery deadlines for the merits of the action, until after disposition of the motions to dismiss had occurred.

On January 26, 2007, approximately two and one-half months after Defendants had filed their Rule 12(b)(1) motion, the district court held a hearing on such motion. By this time, the case had been transferred from United States District Judge Richard L. Williams to United States District Judge Robert E. Payne. Thus, Judge Payne conducted the hearing.

On the morning of the hearing, in support of his opposition to Defendants' Rule 12(b)(1) motion, Relator Vuyyuru submitted a supplement to his earlier declaration. After the district court commented that such supplemental declaration was "[h]ardly timely," Relator Vuyyuru stated that the "most important part of [the supplemental declaration] comes from a report that *was received yesterday* from the DMAS, the Department of Medical Assistance Services for the State of Virginia." (J.A. 476) (emphasis added). According to the supplemental declaration, DMAS administers Medicaid money to providers, including Dr. Jadhav, and the report contains "information regarding the billings made by [Dr. Jadhav] to DMAS from and payments from DMAS to [Dr. Jadhav]." (J.A. 427). Relator Vuyyuru

attached the report as an exhibit to his supplemental declaration. The report contains no patient names or ages; instead it lists, in a spreadsheet format, various procedure codes relating to colonoscopies, amounts billed and corresponding amounts paid.

Additionally, Relator Vuyyuru's supplemental declaration states that, in 2001, he was the director of endoscopy at JRMC, and later assistant director. Worth mentioning for purposes of this appeal, he also declared that: (1) he was on the medical staff at SRMC from 1997 until 2004; (2) from 1997 through 2005, he monitored and investigated work performed by Dr. Jadhav, including reviewing his charts; (3) he observed that Dr. Jadhav failed to perform and record comprehensive history and physical examinations on the majority of his patients who would qualify for use of current procedural terminology code (CPT code) 99253, which code, according to Relator Vuyyuru, is defined, *inter alia*, as "a detailed history; a detailed examination; and medical decision making of low complexity," (J.A. 428); (4) his interviews with individuals who performed billing services under the direction of Dr. Jadhav and his review of Dr. Jadhav's patient records confirmed that Dr. Jadhav "billed both Medicaid and Medicare and further that the most common code that he used was CPT code 99253," (J.A. 429); (5) based upon his observation of Dr. Jadhav's practice, and "investigation, including the review of his charts, [he] determined that [Dr. Jadhav] did not provide the services required to bill patients for CPT code 99253 as he did," *id.*; (6) by reviewing Dr. Jadhav's patient charts, he observed a pattern by which

if a patient did not have a polyp, it was Dr. Jadhav's regular practice to perform a biopsy of the IC-Valve; (7) Relator Vuyyuru performed colonoscopies upon several of Dr. Jadhav's patients, after Dr. Jadhav had already performed incomplete colonoscopies upon such patients, and found polyps and tumors that Dr. Jadhav failed to observe; (8) the DMAS billing report shows ninety-three billings from 2001 to 2005 for which Dr. Jadhav billed the government for biopsied IC-Valves; and (9) in his investigation, he "observed that at no time did [Dr. Jadhav] biopsy the IC-Valve when he was able to bill for removing a polyp or AVM or other legitimate pathology, evidencing that his biopsies of IC-Valve was done solely to increase billing," which practice is reflected in the attached DMAS billing report. (J.A. 430-31).

During the hearing, Relator Vuyyuru, for the first time, requested leave to conduct discovery on the jurisdictional issues raised in Defendants' Rule 12(b)(1) motion, in an effort to prove the facts necessary to avoid dismissal of his FCA claims pursuant to § 3730(e)(4)(A)'s public disclosure jurisdictional bar. In its subsequent order granting Defendants' Rule 12(b)(1) motion, the district court ruled that Relator Vuyyuru was not entitled to more time to gather the type of evidence required to establish subject matter jurisdiction over his FCA claims. As its rationale for so ruling, the district court stated:

> [P]rior to the January 27, 2007 hearing on the defendants' Motions . . . [p]ursuant to Rules 12(b)(1) and 12(b)(6), the plaintiff did not

> request a period of discovery in order to respond to that motion, or an evidentiary hearing to prove jurisdiction. . . . Only at the end of that hearing, after failing to provide any specific facts in response to the Court's request to do so at the hearing, did plaintiff request more time to provide them. Plaintiff, however, had over ten months to provide such facts. He filed four different iterations of a complaint. He also was on notice for over three months that defendants were challenging subject matter jurisdiction in this case. . . . Plaintiff, therefore, had ample opportunity to gather the type of evidence required to demonstrate to the Court that subject matter jurisdiction exists in this case. He did not gather any.

(J.A. 565 n. 3).

Through colloquy with counsel, the district court was able to establish several significant facts during the hearing, which were relevant to the jurisdictional issues of fact under § 3730(e)(4)(A)-(B). Relator Vuyyuru withdrew from practicing medicine at SRMC in March 2003, followed by SRMC's official suspension of his privileges to practice medicine at its facility in March 2004. Moreover, JRMC suspended Relator Vuyyuru's privileges to practice medicine at its facility in April 2005.

On March 28, 2007, the district court granted Defendants' Rule 12(b)(1) motion. Specifically, the

district court dismissed Relator Vuyyuru's FCA claims pursuant to § 3730(e)(4)(A)'s public disclosure jurisdictional bar. In ruling on the motion, the district court expressly made a finding that the allegations in the Third Amended complaint, pertaining to the FCA claims, "were actually derived from" the Virginia Times articles. (J.A. 560) (internal quotation marks omitted). Moreover, the district court also expressly held that Relator Vuyyuru "has not demonstrated the specific facts required for the Court to grant him 'original source' status." *Id.* The district court dismissed Relator Vuyyuru's remaining state law claims for lack of federal question jurisdiction, *see* 28 U.S.C. § 1331, and for lack of diversity jurisdiction, *id.* § 1332.

On April 11, 2007, The Cameron Foundation moved for an award of $100,112.50 in attorneys' fees and costs on the ground that Relator Vuyyuru's claim that the district court possessed subject matter jurisdiction and the FCA claims themselves were clearly frivolous, clearly vexatious, and clearly brought primarily for the purposes of harassment. Relator Vuyyuru opposed the motion on the following grounds: (1) neither his claim to proper relator status nor his FCA claims were clearly frivolous, clearly vexatious, or brought for the purposes of harassment; (2) the fees sought were excessive; and (3) he lacked the ability to pay. On May 14, 2007, the district court ordered The Cameron Foundation to submit a revised fee application, itemizing attorneys' fees in such a manner that lists entries only relating to the FCA claims and documenting "the reasonableness of the claimed hourly rate by proofs from sources outside

the law firm of which [The Cameron Foundation's] counsel are members." (J.A. 707). The district court also ordered Relator Vuyyuru to provide specific financial information detailing his inability to pay attorneys' fees. Relator Vuyyuru subsequently waived his request to have the district court consider his financial condition in connection with The Cameron Foundation's fee application.

In its revised fee application, The Cameron Foundation sought $68,228.75 in attorneys' fees and costs. The district court determined this amount to be reasonable and supported by the evidence. Accordingly, on August 27, 2007, the district court ordered Relator Vuyyuru to pay The Cameron Foundation $68,228.75 in attorneys' fees and costs under 31 U.S.C. § 3730(d)(4).

Relator Vuyyuru separately noted timely appeals of the district court's order of dismissal and its fees/costs award. Those appeals have been consolidated for our review.

II.

We first address Relator Vuyyuru's challenge to the district court's dismissal of his FCA claims for lack of subject matter jurisdiction. Relator Vuyyuru's challenge has two prongs. The first contends the district court erred in the manner in which it viewed the evidence. The second contends the district court erred by ruling on the Defendant's Rule 12(b)(1) motion without affording him the opportunity to conduct discovery on the jurisdictional issues of fact. Neither has merit.

Appendix A

In the first prong of Relator Vuyyuru's challenge to the district court's Rule 12(b)(1) dismissal of his FCA claims, Relator Vuyyuru takes issue with the district court's deciding 31 U.S.C. § 3730(e)(4)'s "based upon" and "original source" issues as a trier of fact, without giving him the benefit of viewing the evidence in the record on those issues in the light most favorable to him and drawing all reasonable inferences from such evidence in his favor. According to Relator Vuyyuru, he was entitled to such a favorable viewing, because § 3730(e)(4)'s "based upon" and "original source" issues are jurisdictional issues inextricably intertwined with the merits of his FCA claims. Moreover, according to Relator Vuyyuru, when the record evidence regarding § 3730(e)(4)'s "based upon" and "original source" issues is viewed in the light most favorable to him and all reasonable inferences are drawn in his favor, the conclusion looms that his FCA claims should have survived Defendants' Rule 12(b)(1) motion.

Before specifically addressing Relator Vuyyuru's individual arguments and contentions as just set forth, we endeavor to review the appropriate legal framework under which we must consider them. The district courts of the United States are courts of limited subject matter jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). They possess only the jurisdiction authorized them by the United States Constitution and by federal statute. *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2365, 168 L.Ed.2d 96 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts

have jurisdiction to consider."); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

When, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proving the truth of such facts by a preponderance of the evidence. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982) ("The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction."). Unless "the jurisdictional facts are intertwined with the facts central to the merits of the dispute," the district court may then go beyond the allegations of the complaint and resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits. *Id.*; *see also Arbaugh*, 546 U.S. at 514, 126 S.Ct. 1235 ("[I]n some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of contested facts.") (internal citations omitted); *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir.1997) ("Factual attacks . . . challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.") (internal quotation marks omitted);

Williams v. United States, 50 F.3d 299, 304 (4th Cir.1995) (district "court may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning [subject matter] jurisdiction"). We review a district court's jurisdictional findings of fact on any issues that are not intertwined with the facts central to the merits of the plaintiff's claims under the clearly erroneous standard of review and any legal conclusions flowing therefrom *de novo*. *Velasco v. The Government of Indonesia*, 370 F.3d 392, 398 (4th Cir.2004) ("We review the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom *de novo*."); *Sligh v. Doe*, 596 F.2d 1169, 1171 & 1171 n. 9 (4th Cir.1979) (reviewing district court's finding of jurisdictional fact that parties had diversity of citizenship under the clearly erroneous standard of review and describing the applicability of such standard as "plain"); *see also Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir.2008) ("Where, as here, subject-matter jurisdiction turns on a question of fact, we review the district court's factual findings for clear error and review its legal conclusions *de novo*."). If the jurisdictional facts "are so intertwined with the facts upon which the ultimate issues on the merits must be resolved," *Adams*, 697 F.2d at 1220, "the entire factual dispute is appropriately resolved only by a proceeding on the merits," *id.* at 1219.

In the case at hand, 31 U.S.C. § 3730(e)(4) sets forth the jurisdictional facts of which Relator Vuyyuru bore the burden of proving by a preponderance of the

evidence in order to survive Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) (§ 3730(e)(4) is a "jurisdiction-removing provision"). Once Defendants challenged the district court's subject matter jurisdiction under § 3730(e)(4), when considered in light of the record below, Relator Vuyyuru first bore the burden of proving that the allegations underpinning his FCA claims were not "based upon" the Virginia Times articles. *Id.* If he carried this burden, § 3730(e)(4)(A)'s public disclosure jurisdictional bar would not apply. However, if he failed to carry this burden, he then bore the separate and distinct burden of proving himself entitled to original source status, which burden required him to prove that he was "an individual who has direct and independent knowledge of the information on which the allegations [in the Third Amended Complaint] are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). *See also Rockwell*, 549 U.S. at 471-72, 127 S.Ct. 1397 (holding that the "information" to which § 3730(e)(4)(B) speaks, refers to the information on which relator's allegations are based, not upon the information on which the publicly disclosed allegations that triggered § 3730(e)(4)(A)'s public disclosure jurisdictional bar are based).

Hoping to avoid appellate review of the district court's jurisdictional findings under the clearly erroneous standard, Relator Vuyyuru baldly asserts

that the jurisdictional issues are intertwined with the factual issues central to the merits of his FCA claims. We disagree. A direct comparison of the nature of the jurisdictional issues with the factual issues central to the merits of Relator Vuyyuru's FCA claims dispels any notion of such intertwining. Relator Vuyyuru's FCA claims arise under 31 U.S.C. § 3729(a)(1)-(3). In *seriatim*, these statutory subsections impose liability on any person who "knowingly presents, or causes to be presented, to [the government] a false or fraudulent claim for payment or approval," *id.* § 3729(a)(1), "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the [g]overnment," *id.* § 3729(a)(2); or "conspires to defraud the [g]overnment by getting a false or fraudulent claim allowed or paid," *id.* § 3729(a)(3).

In *Allison Engine Co., Inc. v. United States ex rel. Sanders*, __ U.S. __, 128 S.Ct. 2123, 170 L.Ed.2d 1030 (2008), the Supreme Court recently clarified the differing proof requirements of these three subsections. As the plain language of § 3729(a)(1) suggests, liability under subsection (a)(1) requires proof that the defendant actually presented or caused to be presented a false or fraudulent claim to the government. *Allison Engine Co., Inc.*, 128 S.Ct. at 2129. Although subsection (a)(2) has no such requirement, it does require proof "that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the [g]overnment.' " *Allison Engine Co., Inc.*, 128 S.Ct. at 2130. With respect to subsection (a)(3),

where as here, "the conduct that the conspirators are alleged to have agreed upon involved the making of a false record or statement, it must be shown that the conspirators had the purpose of 'getting' the false record or statement to bring about the [g]overnment's payment of a false or fraudulent claim." *Allison Engine Co., Inc.*, 128 S.Ct. at 2130. Moreover, under subsection (a)(3), "it must be established that they agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim." *Allison Engine Co., Inc.*, 128 S.Ct. at 2130-31.

Logic dictates that whether (1) any of the Defendants ever presented or caused to be presented a false or fraudulent claim to the government, (2) made a false record or statement for the purpose of getting a false or fraudulent claim paid or approved by the government, or (3) conspired for the purpose of using a false record or statement to bring about the government's payment of a false or fraudulent claim, are not issues intertwined with whether (1) the allegations in the Third Amended Complaint were based upon the Virginia Times articles or (2) Relator Vuyyuru had direct and independent knowledge of Defendants' alleged conduct giving rise to FCA liability, *i.e.*, the substantive issues. In the words of the Third Circuit:

> The jurisdictional requirements of the FCA involve assessing whether the allegations and transactions constituting the bases of the claims were publicly disclosed and whether, if

> they were, the relator is an original source—meaning that he has direct and independent knowledge of the information. 31 U.S.C. §§ 3730(e)(4)(A)-(B). If a relator gets over these hurdles, he must then make his substantive case.

United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 515 (3d Cir.2007). The proof required to establish the substantive elements of Relator Vuyyuru's claims under § 3729(a)(1)-(3) is wholly distinct from that necessary to survive Defendants' jurisdictional challenge under § 3730(e)(4). *See Atkinson*, 473 F.3d at 515. *See also United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 309 (4th Cir.2008) (remanding *qui tam* action to district court with instructions to make the necessary jurisdictional findings of fact pertaining to § 3730(e)(4)'s jurisdictional bar, after "permit[ting] the parties to submit additional evidence as may be necessary for the court to make the factual determinations upon which the jurisdictional questions turn").

Having determined that the jurisdictional issues are not intertwined with the central merits of Relator Vuyyuru's FCA claims, we now turn to review the district court's jurisdictional findings of fact under the clearly erroneous standard of review. Under this deferential standard of review, we will not overturn a district court's finding of fact "simply because we would have decided the case differently." *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (internal

quotation marks omitted). Rather, we will only overturn a district court's finding of fact as clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

The first jurisdictional finding of fact under review is the district court's finding that the allegations of the Third Amended Complaint pertaining to the FCA claims were based upon, *i.e.*, actually derived from, the Virginia Times articles. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.1994) ("[A] relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based."). After reviewing the relevant evidence on this issue ourselves, we are not left with the definite and firm conviction that a mistake has been committed—far from it. The district court correctly observed that many of the substantive allegations in the Third Amended Complaint pertaining to the FCA claims were substantially similar to the allegations in the newspaper article written by reporter Dorothy Rowley and published on the front page of the Virginia Times almost one year prior to Relator Vuyyuru's filing of this action. Given that: (1) the newspaper article preceded Relator Vuyyuru's filing of this action by almost a year; (2) Relator Vuyyuru denied under oath that he had been a source for several articles in the Virginia Times and essentially stated under oath that he had only ever given

news reporters background medical information and then only did so when asked to help the reporter understand a medical issue; and (3) Relator Vuyyuru offered no evidence, in the form of a sworn affidavit or otherwise, stating that he was the source of the March 30, 2005 newspaper article by Dorothy Rowley or any of the other Virginia Times articles, the district court logically reasoned that "[t]he remarkable similarities between the news article and the allegations contained in [paragraphs 20 and 27 of the Third Amended Complaint] are significant proof that the latter are 'actually derived' from the former." (J.A. 558).

Relator Vuyyuru does not dispute that the allegations in the March 30, 2005 newspaper article by Dorothy Rowley are remarkably similar to the substantive allegations pertaining to his FCA claims. Rather, he takes issue with the district court's reasoning that the remarkable similarities serve as significant proof that the substantive allegations pertaining to his FCA claims are actually derived from the article, arguing that "[t]here is nothing in the record to show that [he] was not a source for that article." (Relator Vuyyuru's Opening Br. at 32). Relator Vuyyuru's argument is factually wrong and logically flawed. His argument is factually flawed, because, as we have already mentioned, Relator Vuyyuru denied under oath that he had been a source for several articles in the Virginia Times and essentially stated under oath that he had only given news reporters background medical information and then only did so when asked to help the reporter understand a medical issue. While such deposition

testimony is not alone conclusive evidence that he was not a source of the Rowley article, it strongly suggests that he was not. Relator Vuyyuru's argument is logically flawed, because it ignores the fact that he bears the burden of proving the necessary jurisdictional facts and begs the question as to why he did not simply offer his own sworn statement to the district court unequivocally stating that he was the primary source for the Rowley article.

In his last shot at attacking the district court's factual finding that his substantive allegations pertaining to the FCA claims were derived from a public disclosure within the meaning of § 3730(e)(4)(A), Relator Vuyyuru points us to the fact that he wrote and published an editorial in the Virginia Times on March 30, 2005, which editorial outlines some of the same allegations against Dr. Jadhav that he makes in his Third Amended Complaint. Relator Vuyyuru complains that the district court's analysis ignored the fact that he wrote this editorial. Assuming *arguendo* that the district court's analysis did ignore the fact that Relator Vuyyuru wrote the editorial, such action is of no benefit to Relator Vuyyuru's cause on appeal. This is because the editorial says absolutely nothing about Dr. Jadhav defrauding the government by presenting or causing to be presented even a single false or fraudulent claim for payment to the government, which is the *sin qua non* of a § 3729(a)(1) violation. *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir.2002); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir.1999). Similarly, the

editorial says nothing about the Defendants knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government nor anything about the Defendants conspiring to defraud the government by getting a false or fraudulent claim allowed or paid. Thus, even under the best-case-scenario for Relator Vuyyuru, which is that some of the allegations in his Third Amended Complaint pertaining to the FCA claims were not based upon a public disclosure, *e.g.*, Dr. Jadhav performed colonoscopies in less than five minutes when they normally take fifteen minutes, he still cannot show that the district court's "based upon" finding is clearly erroneous. Section 3730(e)(4)(A)'s public disclosure jurisdictional bar encompasses actions even partly based upon prior public disclosures. *See United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1176 n. 6 (10th Cir.2007); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.1993); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir.1992). In sum, we hold that the district court's finding that the allegations of the Third Amended Complaint pertaining to the FCA claims were based upon, *i.e.*, actually derived from, the public disclosure of allegations from the news media is not clearly erroneous.

The second and last jurisdictional finding of fact under review is the district court's finding that Relator Vuyyuru is not entitled to original source status under

§ 3730(e)(4)(B).[6] After reviewing the relevant evidence on this issue ourselves, we are not at all left with the definite and firm conviction that a mistake has been committed.

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6. We note that the dissent takes the position that the district court decided the original source issue in terms of a facial as opposed to a factual challenge to subject matter jurisdiction. *Post* at 358, 360-61. A full review of the transcript of the hearing on the Rule 12(b)(1) motion and the district court's Memorandum Opinion granting such motion make abundantly clear that the district court ultimately decided the original source issue in terms of a factual challenge to subject matter jurisdiction. For example, in its Memorandum Opinion, the district court observed that Relator Vuyyuru

> has had ample opportunity to supply the Court with the specific facts—as opposed to mere conclusions—showing how and when he obtained direct and independent knowledge of the fraudulent acts that he alleges in his complaint, and to support those allegations with competent proof. He has, however, utterly failed to do so.

(J.A. 565) (internal citation, quotation marks, and ellipsis omitted). *See also* (*J.A.* 565 n. 3, District Court's March, 28, 2007 Mem. Op.) ("Plaintiff . . . had ample opportunity to gather the type of evidence required to demonstrate to the Court that subject matter jurisdiction exists in this case. He did not gather any."). The irony of the situation is that Relator Vuyyuru also views the district court's ruling on the original source issue as one deciding such issue in terms of a factual challenge to subject matter jurisdiction. Indeed, he repeatedly argues that the district court erred in refusing to grant him additional time to conduct discovery in order to obtain actual fraudulent bills for the purpose of proving, through extrinsic evidence, his entitlement to original source status.

First, although the Third Amended Complaint alleges that Dr. Jadhav and SRMC carried on their fraudulent billing scheme involving the unnecessary biopsy of the IC Valve through March 2005, Relator Vuyyuru cannot be a direct and independent source with respect to any allegations of fraud involving SRMC or its facilities after March 2003, because, by that time, Relator Vuyyuru had withdrawn from practicing medicine at SRMC.[7] *See Rockwell*, 549 U.S. at 474-75, 127 S.Ct. 1397 (relator failed to establish direct and

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7. Our dissenting colleague asserts that the district court was presented with evidence casting doubt on the timing of Relator Vuyyuru's departure from SRMC as being March 2003 (such that Relator Vuyyuru would no longer be in a position to gain direct and independent knowledge of any FCA-violative conduct by SRMC after that time). We disagree. First, below, Relator Vuyyuru never disputed defense counsel's statement at the hearing on the Rule 12(b)(1) motion that Relator Vuyyuru "actually withdrew from practicing medicine at [SRMC] in March of '03." (J.A. 498). Moreover, when given the opportunity on appeal to challenge such statement, Relator Vuyyuru did not. Instead, in his Opening Brief on appeal, Relator Vuyyuru stated, in the Statement of the Facts section, that he was "a member of the department of medicine at [SRMC] from 1997 to 2003." (Relator Vuyyuru's Opening Br. at 7). Relator Vuyyuru again made this same statement, in the Argument section of his Opening Brief, in support of his argument that the district court had ignored the fact that he first obtained the information that was not available to the public by reviewing nonpublic medical records. As evidentiary support for such statement, Relator Vuyyuru cited paragraph 5 of his March 2006 Declaration, stating "From on or about 1997 to 2003, I was a member of the department of medicine at Southside Regional Medical Center." (J.A. 251).

original source status because the only false claims found by the jury involved insolid pondcrete discovered after relator left his employment).

Second, with respect to § 3729(a)(1), there is a glaring lack of evidence to establish that, at the time Relator Vuyyuru filed this action on March 13, 2006 (or even by the time he filed the Third Amended Complaint on August 30, 2006), he had direct and independent knowledge that any Defendant in this case had ever presented or caused to be presented a particular false or fraudulent claim to the government or that he had voluntarily provided the government with such information before filing this action. At most, and this characterization is a stretch, Relator Vuyyuru's evidence on this issue shows that he had direct and independent knowledge that: (1) Dr. Jadhav billed Medicaid and Medicare in general, often using CPT code 99253, which requires the doctor to have performed a detailed medical history; a detailed examination; and medical decision making of low complexity; (2) Dr. Jadhav failed to perform and record a comprehensive history and perform physical examinations on the majority of his patients that would qualify for use of CPT code 99253; and (3) Dr. Jadhav performed an unnecessary biopsy upon his (Relator Vuyyuru's) patient Donald F. Case, Jr. and created a history and physical in the patient's chart after the procedure. The disconnect between this information and Relator Vuyyuru's burden of establishing original source status is obvious. Relator Vuyyuru *never* connected his knowledge of any underperformance of medical care by Dr. Jadhav with

an actual claim upon the public fisc by any of the Defendants. Indeed, the single patient which Relator Vuyyuru identifies by name and gives some detailed information, *i.e.*, patient Donald F. Case, was not Medicare eligible and Relator Vuyyuru offered no evidence to establish that he was eligible for any other federal health-care assistance program under which any of the Defendants could have made a claim upon the public fisc. Relator Vuyyuru's mere suspicion that there must be a false or fraudulent claim lurking around somewhere simply does not carry his burden of proving that he is entitled to original source status.

Moreover, our analysis does not, as the dissent contends, require that Relator Vuyyuru "prove the particulars of the individual Medicare or Medicaid claims as a condition to proving how he had direct and independent knowledge of the facts giving rise to those claims." *Post* at 362. Rather, our analysis requires, quite logically, that Relator Vuyyuru prove that he has direct and independent knowledge of the facts giving rise to his FCA claims. Therefore, in the case of an (a)(1) claim against a particular defendant, our analysis requires the relator to prove that he has direct and independent knowledge that the defendant had presented or caused to be presented a particular false or fraudulent claim to the government.

Third, Relator Vuyyuru's evidentiary exhibit which he presented for the first time the day of the hearing on Defendants' Rule 12(b)(1) motion to dismiss, the DMAS billing report, is of no aid to him whatsoever.

Assuming *arguendo* that such report was somehow probative evidence that Defendants actually submitted false or fraudulent claims for payment to the government, such evidence does nothing to carry Relator Vuyyuru's burden of proving what he knew, at the time he filed this action. Likewise, such evidence does nothing to carry his burden of proving, with respect to each of the Defendants, that he informed the FBI or any federal agency that such Defendant had presented or caused to be presented an actual false or fraudulent claim for payment to the government.

There is also a glaring lack of evidence to establish Relator Vuyyuru's original source status with respect to his allegations pertaining to his § 3729(a)(2) and (a)(3) claims. *Allison Engine Co., Inc.*, 128 S.Ct. at 2129. Suffice it to say that Relator Vuyyuru has offered no more than a scintilla of evidence that he had direct and independent knowledge that any of the Defendants in this case actually made a false record or statement for the purpose of getting a false or fraudulent claim paid or approved by the government, 31 U.S.C. § 3729(a)(2), nor more than a scintilla of evidence that he had direct and independent knowledge that Dr. Jadhav conspired with any of the Defendants to make a false record or statement with the purpose of having a material effect in bringing about the government's payment of a false or fraudulent claim, *id.* at § 3729(a)(3); *Allison Engine Co., Inc.*, 128 S.Ct. at 2130-31.

In the second prong of Relator Vuyyuru's challenge to the district court's dismissal of his FCA claims for

lack of subject matter jurisdiction, Relator Vuyyuru contends the district court erred by dismissing his entire action for lack of subject matter jurisdiction without affording him the opportunity to conduct discovery on the jurisdictional issues of fact. In support of this contention, Relator Vuyyuru further contends that when United States District Court Judge Richard L. Williams, communicating through his law clerk, ordered the parties to hold up on discovery until after the pretrial conference, it meant that he was prohibited from conducting discovery on jurisdictional issues of fact necessary to survive Defendants' Rule 12(b)(1) motion.

Relator Vuyyuru's contentions are without merit. First, our review of the record discloses that Relator Vuyyuru had ample notice that Defendants' attack on the basis of the district court's subject matter jurisdiction was a factual attack rather than a facial one. Defendants attached multiple evidentiary exhibits to their Memorandum of Law in support of their Rule 12(b)(1) motion. Relator Vuyyuru acknowledged this fact by stating in his Memorandum in Opposition to Defendants' Rule 12(b)(1) motion that "[t]he [D]efendants essentially ask the court to look outside the pleadings and then to view the evidence in the light most favorable to the moving party. . . ." (J.A. 343). Moreover, Relator Vuyyuru attached two evidentiary exhibits to his Memorandum of Law in Opposition to Defendants' Rule 12(b)(1) motion—(1) his own sworn declaration; and (2) a copy of a page of the Virginia Times, publishing Donald F. Case's April 22, 2005 letter to the Virginia Times—and, just prior to the district

court's hearing on the Rule 12(b)(1) motion, Relator Vuyyuru submitted two more evidentiary exhibits in support of his opposition to such motion. As for Judge Richard L. Williams' order to hold up discovery until after the pretrial conference in the case, such order in no way prevented Relator Vuyyuru from conducting discovery on jurisdictional issues of fact, which are wholly separate from issues of fact on the merits. Indeed, if Relator Vuyyuru was unclear as to whether he needed to seek leave to conduct discovery on jurisdictional issues of fact, he could have requested clarification from the district court long before the hearing on Defendants' Rule 12(b)(1) motion, which he did not do. Moreover, the district court did not abuse its discretion in refusing to grant Relator Vuyyuru additional time to conduct discovery on the jurisdictional issues of fact.

Even if we assumed *arguendo* that Relator Vuyyuru was somehow prevented by the district court from conducting discovery on jurisdictional issues of fact, such an assumption would not advance Relator Vuyyuru's case on appeal. This is because Relator Vuyyuru does not identify any evidence that he might have obtained through discovery, which would be relevant to establish the jurisdictional facts in his favor. Similarly, Relator Vuyyuru did not proffer below any sworn testimony that he was prepared to give on the stand at the hearing which would have carried his burden of establishing the jurisdictional facts under § 3730(e)(4) in his favor. One also wonders why Relator Vuyyuru would have even needed discovery regarding, for example, how he gained direct and independent knowledge of the alleged false

billings submitted by Defendants, because such information should be within his own custody and control.

In sum, we hold the district court's findings with respect to the jurisdictional issues of fact under § 3730(e)(4) are not clearly erroneous, and thus, the district court did not err as a matter of law in dismissing the Third Amended Complaint for lack of subject matter jurisdiction. Accordingly, we affirm such dismissal.

III.

We next address Relator Vuyyuru's challenge to the district court's award of attorneys' fees and costs to The Cameron Foundation. Relator Vuyyuru's challenge is without merit.

Upon motion by The Cameron Foundation, the district court awarded it the sum of $68,228.75 in attorneys' fees and costs under 31 U.S.C. § 3730(d)(4), which statutory subsection provides that, where the government does not proceed with an FCA claim and the relator conducts the action,

> the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Id. From our careful reading of the district court's August 27, 2007 Memorandum Opinion addressing The Cameron Foundation's motion for an award of attorneys' fees and costs, we are convinced that the district court based its attorneys' fees/costs award upon its findings that The Cameron Foundation prevailed in this action, and that Relator Vuyyuru's claim of subject matter jurisdiction over his FCA claims was clearly frivolous.

Relator Vuyyuru first attacks the district court's attorneys' fees/costs award on the basis that the district court erroneously ignored the appropriate standard in determining whether he was a proper relator under § 3730(e)(4). In this regard, Relator Vuyyuru makes much the same arguments that he made in challenging the district court's Rule 12(b)(1) dismissal of the Third Amended Complaint. According to Relator Vuyyuru, the district court's action in ignoring the appropriate standard in determining whether he was a proper relator under § 3730(e)(4) warrants reversal of the dismissal order, which reversal, in turn, "necessitates reversal of the attorney fees award." (Relator Vuyyuru's Opening Br. at 49). Relator Vuyyuru then goes on to argue that:

> even without a reversal of the dismissal, it is error on the record in this case to find that [he] clearly had no reasonable chance of success proving that he had direct and independent knowledge of the information on which the allegations were based and had voluntarily provided information to the

> Government before filing this action under the FCA based on the information.

Id.[8] Finally, Relator Vuyyuru argues that the amount of the attorneys' fees/costs award is excessive. In this regard, Relator Vuyyuru challenges the number of attorney hours credited by the district court and the district court's determination that attorney Rita Davis' billing rate of $310 per hour is reasonable.

We address each of Relator Vuyyuru's arguments in turn, reviewing the district court's decision to award The Cameron Foundation attorneys' fees and costs under § 3730(d)(4) and the amount of such award for abuse of discretion. *Mikes v. Straus*, 274 F.3d 687, 704 (2d Cir.2001) ("We review for abuse of discretion both the decision to grant attorneys' fees under § 3730(d)(4) of the False Claims Act and the amount."). "Our review of the district court's award is sharply circumscribed; we have recognized that because a district court has

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8. For the first time in this appeal, Relator Vuyyuru argues in his Reply Brief that The Cameron Foundation did not "prevail[ ]" in this action, as that term is used in § 3730(d)(4). We do not address this argument, because having been raised for the first time on appeal in Relator Vuyyuru's Reply Brief, the argument is abandoned. *See Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir.2001) (concluding that petitioner abandoned argument on appeal raised for the first time in reply brief by failing to raise it in opening brief); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir.1999) (concluding that claim not properly raised in appellant's opening brief is deemed abandoned).

close and intimate knowledge of the efforts expended and the value of services rendered, the fee award must not be overturned unless it is clearly wrong." *Plyler v. Evatt*, 902 F.2d 273, 277-78 (4th Cir.1990) (internal quotation marks and alterations omitted).

The FCA does not define the term "clearly frivolous," as that term is found in § 3730(d)(4). For purposes of this appeal only, we accept Relator Vuyyuru's suggested definition and ask whether, on the record in this case, when viewed objectively, did Relator Vuyyuru's claim that he qualified as a proper relator under § 3730(e)(4), clearly have no reasonable chance of success? *Mikes*, 274 F.3d at 705 (upholding award of attorneys' fees under § 3730(d)(4)'s clearly frivolous element on the basis that plaintiff's allegations clearly had no chance of success, because they were bereft of any objective factual support). Without a doubt, we answer this question in the affirmative. As we have already extensively outlined the momentous failings of Relator Vuyyuru's evidence pertaining to his burden of establishing himself as a proper relator in order to avoid § 3730(e)(4)'s public disclosure jurisdictional bar, we will not reiterate such analysis here. Suffice it to say, that, when the evidence in the record is viewed objectively, Relator Vuyyuru's claim that he qualified as a proper relator clearly had no reasonable chance of success. In sum, we hold the district court did not abuse its discretion in deciding to award The Cameron Foundation attorneys' fees and costs under § 3730(d)(4).

Turning to the question of whether the district court abused its discretion regarding the amount of attorneys' fees and costs that it awarded, we hold that such amount is not excessive. In calculating an appropriate attorneys' fee award, a district court must first determine the lodestar amount (reasonable hourly rate multiplied by hours reasonably expended), applying the *Johnson/Barber* factors when making its lodestar determination. *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir.1978) (adopting twelve factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), *overruled on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989)).

> This court has summarized the *Johnson* factors to include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney

and client; and (12) attorneys' fees awards in similar cases.

Spell v. McDaniel, 824 F.2d 1380, 1402 n. 18 (4th Cir.1987).

In making its lodestar calculation, the district court used the $310 per hour figure for attorney Rita Davis sought by The Cameron Foundation. Our review of the record discloses that the district court did not abuse its discretion in using this figure. The declarations and submissions attached to The Cameron Foundation's Revised Fee Application documented the hourly rates actually paid by The Cameron Foundation, provided evidence of attorney Rita Davis' actual billing practices, and established that $310 per hour for Rita Davis was reasonable in light of the standard charges for like services by the law firm Hunton & Williams in similar cases and for the fees customarily charged in the relevant market for attorneys of Rita Davis' experience and performance level.

Finally, although Relator Vuyyuru attempts to nitpick the number of hours the district court determined that attorneys for The Cameron Foundation reasonably expended in defending against his FCA claims, our review of the record discloses that the district court did not abuse its discretion in this regard.[9]

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9. We also reject as without merit Relator Vuyyuru's challenge to the district court's granting of The Cameron Foundation's motion to strike a supplemental brief and

(Cont'd)

IV.

In conclusion, we hold the district court did not err by: (1) dismissing the Third Amended Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1); and (2) awarding The Cameron Foundation $68,228.75 in attorneys' fees and costs under 31 U.S.C. § 3730(d)(4).[10]

AFFIRMED

(Cont'd)

supporting declaration filed by Relator Vuyyuru on August 8, 2007, in which he made various assertions about The Cameron Foundation's authority to indemnify Petersburg Hospital Company, L.L.C. As the district court cogently explained in ruling on the motion, it never granted Relator Vuyyuru leave to file the brief and the issues raised in it were not raised in his original brief in opposition to The Cameron Foundation's motion for attorneys' fees and costs, "even though it was clear in that application that The Cameron Foundation had assumed the defense of Petersburg Hospital Company LLC." (J.A. 928-29). Moreover, "[t]he time entries at issue were also in the original fee application and Plaintiff made no objection to them." (J.A. 929).

10. To the extent we have not specifically addressed any remaining argument by Relator Vuyyuru in challenge to the district court's dismissal of the Third Amended Complaint or the fees/costs award, we find such arguments without merit.

Appendix A

REIDINGER, District Judge, dissenting:

Because I believe that the district court clearly erred in finding that Relator Vuyyuru's allegations were "based upon" a public disclosure and that he was not an "original source" of these allegations, I respectfully dissent.

I.

As the majority correctly states, § 3730(e)(4)(A) is a "jurisdiction-removing provision," citing *Rockwell International Corp. v. United States*, 549 U.S. 457, 468, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007). (Opinion at 348). A defendant may challenge subject matter jurisdiction of a FCA claim via a Rule 12(b)(1) motion to dismiss in one of two ways. First, a defendant may contend "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982), *i.e.*, a "facial attack," *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1260-61 (11th Cir.1997). When a defendant makes a facial attack upon a complaint for lack of subject matter jurisdiction, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams*, 697 F.2d at 1219. Alternatively, the defendant may contend that the complaint's jurisdictional allegations simply are not true, *id.*, *i.e.*, a "factual attack," *Garcia*, 104 F.3d at 1260. When a factual attack is made, the burden is on the plaintiff to prove the existence of

subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991). When a defendant challenges the factual basis of a complaint's jurisdictional allegations, the district court may "go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Adams*, 697 F.2d at 1219. In so doing, the district court "may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment." *Id.*

As a threshold matter, it is problematic to ascertain whether the district court undertook to conduct a facial or factual review of the challenge to subject matter jurisdiction in this case. The majority readily concludes that the district court's review was factual. (Opinion at 354-55). With this, I feel compelled to disagree in part. As to the question of whether Relator Vuyyuru's allegations are "based upon" a public disclosure, the district court considered extrinsic evidence consisting of the Virginia Times articles, and thus clearly undertook a factual review. When it moved to the question of whether Relator Vuyyuru was an "original source" of the information giving rise to the allegations, however, the district court was not so clear as to whether it undertook a factual or facial review. The district court repeatedly refers to the allegations found in the "complaint" or the "TAC" (Third Amended Complaint) while asserting that Relator Vuyyuru "consistently has failed to provide specific facts" about these allegations. (J.A. 562). Ultimately, the district court holds that "[i]n

light of the generalities and conclusory statements that permeate the TAC [Third Amended Complaint] and the plaintiff's briefs on the jurisdictional issue, the Court cannot making [sic] a finding that plaintiff had 'direct' knowledge of the allegations in the TAC apart from what appeared in the public domain well before the TAC was filed." (J.A. 564). Based on this language, one can only conclude that the district court made its decision based on the allegations rather than the evidence and thus conducted only a facial examination regarding the issues of whether Relator Vuyyuru had "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).[1]

The district court having undertaken such a hybrid review may not, of itself, constitute error, but it at least requires that the review of these portions of the district court's order be conducted independently of one another, applying the different standards of review under *Adams*.

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1. The majority quite reasonably buttresses its view of the nature of the district court's review by pointing out that Relator Vuyyuru also argues that the district court's review was factual in nature (Opinion at 352 n. 6), and that the transcript of the proceedings below supports this conclusion as well. It is, however, the disposition of that issue that is before this Court for review, and that disposition is found in the Memorandum Opinion. I believe that the Memorandum Opinion reflects that the nature of the district court's *decision* was an inappropriate hybrid of a facial and factual review.

Appendix A

II.

This Court has held that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has *actually derived from* that disclosure the allegations upon which his *qui tam* action is based." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.1994) (emphasis added). The majority concludes that "the district court logically reasoned that '[t]he remarkable similarities between the news article and the allegations contained in [paragraphs 20 and 27 of the Third Amended Complaint] are *significant proof* that the latter are 'actually derived' from the former.' " (Opinion at 350) (quoting J.A. 558) (emphasis added). I disagree.

Siller instructs that finding allegations to be "based upon" a public disclosure requires more than a finding of similarity between the public disclosure and the complaint's allegations. "[I]t is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic." *Id.* As the Siller Court noted, this Court's interpretation of the "based upon" requirement differs from other circuits. *Id.* ("We are aware . . . that other circuits have not embraced this interpretation of the phrase, assuming instead that an action is based upon a public disclosure of allegations if its allegations are identical or similar to those already publicly disclosed."). While other circuits may disagree with this approach, *Siller* remains the law in this circuit.

Accordingly, I would hold that the district court committed clear error in finding that the similarities between Relator Vuyyuru's allegations and the newspaper articles constituted proof that the allegations were "based upon" a prior public disclosure.

I also do not agree with the majority's suggestion (Opinion at 350-51) that to overcome this "significant proof" Relator Vuyyuru had to produce evidence to show that he was, in fact, the source of the newspaper articles. Under *Siller*, whether Relator Vuyyuru was the source of the newspaper articles is not relevant; what matters is whether he has produced evidence to show that his allegations were not "actually derived from" this public disclosure. Moreover, imposing this requirement upon a relator appears at odds with the Supreme Court's decision in *Rockwell*. *See* 549 U.S. at at 470-72, 127 S.Ct. 1397 (holding phrase "information on which the allegations are based" refers to information on which the *relator's allegations* are based, not information on which *publicly disclosed allegations* are based).

The district court concluded that Vuyyuru "consistently has failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Third Amended Complaint]." (J.A. 562). It is significant that the district court held that Relator Vuyyuru "failed to provide" evidence, rather than finding his evidence to be unpersuasive. This demonstrates that the district court concluded that Relator Vuyyuru failed to make a prima facie showing to support subject matter jurisdiction. This was error

because the evidence before the district court was sufficient to support a conclusion that Relator Vuyyuru had carried his burden of demonstrating that his knowledge of the alleged fraudulent acts was not "based upon" public disclosure.

The Third Amended Complaint sets forth on its face a basis for Relator Vuyyuru's knowledge separate and apart from the public disclosure. Specifically, Relator Vuyyuru alleges that he learned that Dr. Jadhav had performed unnecessary biopsies by reviewing Dr. Jadhav's medical records and from medical staff who had observed Dr. Jadhav's practices. Relator Vuyyuru further alleges that he discovered that Dr. Jadhav failed to complete colonoscopy procedures (despite billing for complete procedures) through his review of Dr. Jadhav's charts and through his own subsequent examinations of a number of Dr. Jadhav's patients. Relator Vuyyuru specifically alleges that during these examinations, he discovered lesions, polyps, and cancer which would have been detected had Dr. Jadhav in fact performed complete colonoscopy procedures.

Relator Vuyyuru also presented the district court with declarations that include significant evidence regarding the manner in which Relator Vuyyuru obtained knowledge of the fraudulent acts alleged in the Third Amended Complaint. For example, in a declaration filed in support of his original complaint, Relator Vuyyuru testifies that his knowledge of the complaint's allegations was based upon personal observation, information provided to him by medical staff, patients,

patients' families, and his review of medical records. In his supplemental declaration, Relator Vuyyuru further clarifies the basis of knowledge of the complaint's allegations separate and apart from the public disclosure of these claims in the media. Specifically, he testifies that from 1997 through 2005, he personally monitored and investigated Dr. Jadhav's work. Relator Vuyyuru makes clear that he personally reviewed Dr. Jadhav's medical charts and specifically observed from this review that Dr. Jadhav had a practice of regularly performing unnecessary biopsies of the IC-valve. Relator Vuyyuru further testifies that in his investigation of Dr. Jadhav's medical charts, he observed that Dr. Jadhav never performed a biopsy of the IC-valve when he was able to bill for removing a polyp or other legitimate pathology, a practice which Relator Vuyyuru contends constitutes evidence that the biopsies of the IC-valve were done solely to increase billing. Relator Vuyyuru further testifies that he interviewed pathologists at both JRMC and SRMC, who confirmed Dr. Jadhav's practices regarding IC-valve biopsies. Vuyyuru also states in his supplemental declaration that he learned about Dr. Jadhav's allegedly fraudulent billing from his personal interviews of the individuals who performed billing services for Dr. Jadhav as well as through the subsequent colonoscopy procedures Relator Vuyyuru performed on several of Dr. Jadhav's patients during which he found polyps and tumors that Dr. Jadhav would have observed had complete colonoscopy procedures been performed on these patients.

Based upon this evidence regarding the manner in which Relator Vuyyuru obtained knowledge of the fraudulent acts alleged in the Third Amended Complaint, I would hold that the district court erred in concluding that the allegations in the Third Amended Complaint were "based upon" the public disclosure.

III.

Next, the majority holds that the district court did not err in finding that Relator Vuyyuru was not an "original source" of the Third Amended Complaint's allegations. I disagree for a number of reasons.

The district court limited its analysis on this issue to a review of the *allegations* in the Third Amended Complaint. Thus, even though the district court had before it evidence purporting to support Relator Vuyyuru's contention that he was an original source, the district court concluded that subject matter jurisdiction did not lie based on a facial analysis of the pleadings. The district court, however, failed to construe the allegations in the Third Amended Complaint as true and did not afford Vuyyuru any of the other protections available under a Rule 12(b)(6) review. *See Adams*, 697 F.2d at 1219 (stating that when facial attack is made, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration"). Had the district court's facial analysis been conducted in accordance with *Adams*, and Relator Vuyyuru's allegations been taken as true, the

allegations in the Third Amended Complaint would have been sufficient to show that he acquired knowledge of the alleged fraudulent acts "through his own efforts, [and] without an intervening agency." *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir.2000) (quoting *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F.Supp. 1010, 1016 (E.D.Va.1995)). Therefore, the district court's order dismissing this action pursuant to Rule 12(b)(1) was in error.

Furthermore, had the district court undertaken to conduct a *factual* review and considered the evidence presented by Relator Vuyyuru, sufficient evidence was presented for Relator Vuyyuru to have carried his burden of demonstrating that he was an original source of the allegations. As detailed above, Relator Vuyyuru presented the district court with declarations that include significant evidence regarding the manner in which Vuyyuru obtained direct and independent knowledge of the fraudulent acts alleged in the Third Amended Complaint.[2]

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2. The majority concludes that Relator Vuyyuru could not be "a direct and independent source with respect to any allegations of fraud involving SRMC or its facilities after March 2003, because, by that time, Relator Vuyyuru had withdrawn from practicing medicine at SRMC." (Opinion at 352). The majority notes that the district court learned this information through "colloquy with counsel," (*id.* at 346), but significantly, as the majority points out (Opinion at 352-53 n. 7), there is

(Cont'd)

The district court further found that Relator Vuyyuru's allegation in the Third Amended Complaint that he "notified government authorities" to be non-specific and conclusory and thus insufficient to show that he voluntarily provided this information to the Government before filing the action. (J.A. 564). Again, the district court found itself torn between conducting a facial analysis and a factual analysis by looking only to the allegations pleaded while applying the factual analysis standard. The district court failed to treat as true the allegations of notice to the government, but rather analyzed the allegations as though they were evidence and found them inadequate, while not considering the declarations submitted by Relator Vuyyuru on this issue. In his declaration of October 24, 2006, Relator Vuyyuru asserts that he reported these allegations of fraud to the FBI (J.A. 364) ("[i]n and around 2002, 2003, and 2004, I spoke with FBI Agents Vanosten and Irons regarding the improper medical procedures and Medicaid and Medicare Fraud by Dr. Jadhav, SRMC and JRMC"); the Attorney General's

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(Cont'd)

conflicting evidence submitted on this point. Moreover, the transcript of the hearing reveals that Relator Vuyyuru's counsel stated that he was suspended from SRMC in March 2004, while it was the *Defendants'* counsel who asserted that Vuyyuru was dismissed from SRMC in March 2003. I would not hold such a failure to respond during an attorney colloquy to amount to a concession. In addition, Relator Vuyyuru's supplemental declaration, which was cited by the majority (Opinion at 345), states that he was on the medical staff at SRMC "until 2004." (J.A. 428).

Office (J.A. 364) ("in and around 2002 and 2003, I spoke with the Attorney General's Office with a representative responsible for investigating Medicaid Fraud regarding the improper medical procedures by Dr. Jadhav and billing fraud at both SRMC and JRMC"); and the Center for Quality Health Care (J.A. 364) ("in 2003, I filed a complaint with the Board of Medicine against Dr. Jadhav regarding unnecessary procedures, but was directed to Center for Quality Health Care"). This declaration alone is sufficient to establish that Relator Vuyyuru "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).[3]

IV.

The majority analyzes Relator Vuyyuru's evidence of his direct and independent knowledge very differently from the district court but still finds it wanting. The majority concludes that "there is a glaring lack of evidence to establish that, at the time Relator Vuyyuru filed this action . . . , he had direct and independent

3. A subsequent declaration by Relator Vuyyuru, filed after the district court's ruling on the motion to dismiss, provides even more detail regarding his contact with the government regarding these allegations. Relator Vuyyuru states in this declaration that he began his discussions with the United States Attorney in October 1998 and met with several FBI agents from 1998 to 2005. He further asserts that in 2003, he was given a letter providing him certain "protections" related to his cooperation with the government. (J.A. 662).

knowledge that any Defendant in this case had ever presented or caused to be presented a particular false or fraudulent claim to the government or that he had voluntarily provided the government with such information before filing this action." (Opinion at 353). Specifically, the majority concludes that "Relator Vuyyuru *never* connected his knowledge of any underperformance of medical care by Dr. Jadhav with an actual claim upon the public fisc by any of the Defendants." (*Id.* at 353) (emphasis in original). In short, the majority requires that the Relator prove the particulars of the individual Medicare or Medicaid claims in order to prove how he had direct and independent knowledge of the facts giving rise to those claims. The question of source of knowledge, however, is separate from the underlying merits. Whether a FCA claim is "ultimately flawed on the merits is an analytically distinct question from the one mandated by the FCA for establishing jurisdiction." *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1047 (10th Cir.2004) (quoting *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 803 (10th Cir.2002)). Indeed, to hold that Relator Vuyyuru's Third Amended Complaint fails for lack of subject matter jurisdiction because he has not pled his FCA claims with sufficient specificity would mean that the jurisdictional question is necessarily intertwined with the merits of the case. If the majority is correct, and sufficient evidence of the facts of the underlying FCA claims must be presented in order for the relator to be able to show how he came to possess such knowledge, then the jurisdictional issue is in fact intertwined with the factual issues of the underlying

claims, and the district court was required to assume jurisdiction and proceed to decide the case on the merits. "When a factual attack on subject matter jurisdiction involves the merit of a dispute, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir.1999) (quoting *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir.1997)) (internal quotation marks and alterations omitted).

Given the substantive deficiencies identified by the majority, it may well be that Relator Vuyyuru's claims would not withstand Rule 12(b)(6) scrutiny. This appeal, however, does not require the Court to decide whether Relator Vuyyuru has stated a claim upon which relief can be granted, but rather to review only the basic threshold assessment of subject matter jurisdiction under § 3730(e)(4). If we allow a case such as this to cause us to set the jurisdictional bar too high, then legitimate FCA claims may go without redress and may even go unfiled.

V.

Because I believe that the district court's dismissal was in error, I would also vacate the district court's award of attorneys' fees to the Defendants. Moreover, even if the finding of a lack of subject matter jurisdiction were sustained, I would still reverse the award of attorneys' fees. Attorneys' fees may be awarded under

§ 3730(d)(4) upon a finding "that the claim of the person bringing the action was clearly frivolous. . . ." 31 U.S.C. § 3730(d)(4). For all of the reasons set forth above, I simply do not believe that Relator Vuyyuru's jurisdictional allegations are "clearly" frivolous.

There is no question that the record presented to the district court was convoluted, due in no small part to the voluminous and oftentimes inartfully drafted filings, and it must have appeared at times that this action was little more than a grudge match between the Relator and the Defendants. The presentation of the facts may have been awkward, and there may well be some substantive flaws in the Relator's claims. At bottom, however, this is a case about a physician who undertook to investigate the medical procedures and billing practices of another physician and the medical facilities at which he worked and found what may well constitute Medicare and Medicaid fraud. Even if such claims may ultimately prove to be frivolous, such frivolousness falls short of the standard of being "clear" based on this record. I would, therefore, vacate the award of attorneys' fees as having been an abuse of discretion.

VI.

Accordingly, I would vacate the orders of the district court dismissing this action for lack of subject matter jurisdiction and awarding the Defendants attorneys' fees and would remand this matter for further proceedings.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION DATED AUGUST 24, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action Number
3:06CV180

UNITED STATES OF AMERICA,
ex rel. LOKESH VUYYURU, M.D.,

Plaintiffs,

v.

GOPINATH JADHAV, M.D., and SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LTD., and PETERSBURG HOSPITAL COMPANY, LLC, and THE CAMERON FOUNDATION, A VIRGINIA NON-PROFIT CORPORATION, and COLUMBIA/HCA JOHN RANDOLPH, INC.,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on The Cameron Foundation's Revised Motion for Attorneys' Fees (Docket No. 62). On May 14, 2007, after considering The Cameron Foundation's original Motion for Attorneys'

Fees (Docket No. 54), the Court ordered The Cameron Foundation to submit a revised fee application and ordered the Plaintiff to provide specific financial information detailing his purported inability to pay attorney's fees (Docket No. 61). After submitting certain information on the topic and after the Court granted The Cameron Foundation's motion for discovery on the plaintiff's financial condition, the Plaintiff waived his request that the Court consider his financial condition in connection with The Cameron Foundation's attorneys' fees application. The Cameron Foundation submitted a revised fee application.

The Cameron Foundation requests attorneys' fees pursuant to 31 U.S.C. § 3730(d)(4) of the Fraudulent Claims Act ("FCA") which provides that, where the government does not proceed with an FCA claim and the relator conducts the action,

> the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

31 U.S.C. § 3730(d)(4).

Having considered the entire record, the Court finds that awarding The Cameron Foundation attorneys fees in this case is appropriate. The Cameron Foundation

prevailed in this action, and the plaintiff's claim was clearly frivolous. Indeed, as detailed in the March 28, 2007 Memorandum Opinion (Docket No. 50), the Plaintiff consistently failed to provide key details and specific facts in support of his claims. Among other glaring deficiencies, the Plaintiff "failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Third Amended Complaint]," failed to provide specific facts about his allegations so that the Court could determine that he was their original source, and failed to provide the "necessary dates and details" to support his claim that fraudulent practices were occurring at John Randolph Medical Center and Southside Regional Medical Center. Remarkably, the Plaintiff failed to provide those facts and details even though he filed *four* different iterations of a complaint (Docket Nos. 1, 2, 21, 25). The record compelled the conclusion that the Plaintiff had no claim and the Court dismissed the action for lack of subject matter jurisdiction.

The remaining issue is the quantum of attorneys' fees that is appropriate in this case. Under § 3730(d)(4), the Court has discretion in determining this amount. *U.S. ex. rel. Mikes v. Straus*, 984 F.Supp.2d 517, 529 (S.D.N.Y.2000). Generally, an appropriate fee award analysis under § 3730(d)(4) involves two components: (1) a determination of a reasonable fee for the services performed in the case, and (2) an assessment of the plaintiff's ability to pay. *Chaplin v. DuPont Advance Fiber Sys.*, 303 F.Supp.2d. 766, 775-76 (E.D.Va.2004). Here, however, the Plaintiff has waived consideration of his ability to pay, so it is necessary to only consider the first component.

Appendix B

The total amount of attorneys' fees and costs sought by The Cameron Foundation in its revised fee application is $68,228.75. This amount is based on billing records submitted by counsel for The Cameron Foundation. The Court must assess the reasonableness of two elements of this request: (1) the hourly billing rates of counsel for The Cameron Foundation, and (2) the number of billable hours that counsel for The Cameron Foundation claim they worked on this case.

First, two attorneys provided services for The Cameron Foundation in this matter: Rita P. Davis and Michael R. Shebelskie. Their hourly billing rates are as follows:

- Rita P. Davis-$310/hour
- Michael R. Shebelskie-$400/hour

Plaintiff does not contest the reasonableness of Mr. Shebelskie's hourly billing rate. He, does, however, contend that Ms. Davis' billing rate is excessive given her "relative inexperience." Plaintiff does not provide any further explanation or evidence of this contention.

In *Rum Creek Coal Sales, Inc. v. Caperton*, the Fourth Circuit held that:

> The hourly rate included in an attorney's fee must . . . be reasonable. This requirement is met by compensating attorneys at the prevailing market rates in the relevant community . . . This determination is fact-intensive and is best guided

> by what attorneys earn from paying clients for similar services in similar circumstances. . . .

Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir.1994)(internal quotations and citations omitted). The Fourth Circuit also has noted that:

> The prevailing market rate may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market.

Spell v. McDaniel, 824 F.2d 1380, 1402 (4th Cir.1987).

The Cameron Foundation's original Motion for Attorneys' Fees (Docket No. 55) contains a declaration from Michael R. Shebelskie. In it, he attests that Ms. Davis is an associate with Hunton & Williams LLP and that her hourly billing rate is the "normal and customary" rate charged for her services to clients involved in comparable cases. He also explained that her billing rate is similar to the rate "charged for like services by other firms of a size and expertise comparable to Hunton & Williams LLP." Plaintiff has not submitted any evidence that would suggest otherwise. Furthermore, The Cameron Foundation's Revised Fee Application contains as order approving a fee application in a 2005 bankruptcy proceeding before the Court wherein hourly rates in line

with those sought in this application (even approving hourly rates as high as $475) were approved. On the record, the Court finds that Ms. Davis' billing rate is reasonable in light of the standard charges for like services by Hunton & Williams in similar cases and for the fees customarily charged in this market for lawyers of Ms. Davis' experience and performance levels.

Second, the billing records submitted by The Cameron Foundation contain two categories of entries: (1) entries for which the entirety of the work was related to Plaintiff's FCA claims and/or consisted of tasks unaffected by the presence of state law claims, and (2) "mixed" entries containing work related to both Plaintiff's FCA and state law claims. The Cameron Foundation is only entitled to recover fees related to Plaintiff's FCA claim because that was the claim on which The Cameron Foundation prevailed. An examination of the billing records discloses that the services performed were reasonably and necessarily undertaken and performed. The Cameron Foundation is entitled to all fees claimed for the first category. This amounts to $37,145.

As to the second category, the mixed entries, The Cameron Foundation requests a fifty percent allocation of fees. The Court finds this request to be reasonable. As The Cameron Foundation observes, based on its records, "its counsel can reliably estimate that at least half of the fees associated with preparation of the motion to dismiss briefs is attributable to the False Claims Act claims." (The Cameron Foundation's Revised Fee App. 4.) This amounts to $31,083.75. Even though this award is based on mixed

entries, courts are permitted to assess attorneys' fees "even where it is not clear exactly how much time was spent on reimbursable matters. . . ." *Bowne of New York City, Inc. v. AmBase Corp.*, 161 F.R.D. 258, 267 (S.D.N.Y.1995). Indeed, "[i]t is . . . less important that judges attain exactitude (which may be impossible) than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent and rates charged in a given case." *Id.* Here, a fifty percent allocation for the mixed entries-which involve the writing of the motion to dismiss brief and its reply-is fair given that approximately half of the issues in this case were related to Plaintiff's FCA claims.

Overall, therefore, the Court finds that the amount of attorneys' fees and costs requested by The Cameron Foundation in its revised fee application is reasonable and fair in light of the issues presented in this case, the time devoted by counsel, the complexity of the issues, both factual and legal, the burden assumed by The Cameron Foundation in defending the case, the experience and expertise required of counsel, and the standard charges for like services by comparable law firms in this region.

Accordingly, the Court will grant The Cameron Foundation's Revised Motion for Attorneys' Fees (Docket No. 62) and awards attorneys' fees and costs to The Cameron Foundation in the amount of $68,228.75.

Additionally, the Court will grant The Cameron Foundation's Motion to Strike (Docket No. 87). On August 8, 2007, Plaintiff filed a supplemental brief in which he made

various assertions about The Cameron Foundation's authority to indemnify Petersburg Hospital Company LLC. The Court did not grant Plaintiff leave to file that brief. Additionally, the issues raised in the supplemental brief were not raised in Plaintiff's original brief in opposition to The Cameron Foundation's Motion for Attorneys' Fees even though it was clear in that application that The Cameron Foundation had assumed the defense of Petersburg Hospital Company LLC. The time entries at issue were also in the original fee application and Plaintiff made no objection to them. Consideration of this brief at this point, therefore, would be highly prejudicial to The Cameron Foundation.

The facts and legal contentions are adequately presented in the materials before the Court and oral argument would not aid the decisional process.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: August 24, 2007

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION DATED MARCH 28, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Civil Action No. 3:06cv180

UNITED STATES OF AMERICA,
ex rel. LOKESH VUYYURU, M.D.,

Plaintiff,

v.

GOPINATH JADHAV, M.D., SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LTD.; PETERSBURG HOSPITAL COMPANY, LLC, and COLUMBIA/HCA JOHN RANDOLPH, INC.,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on the Motions to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Defendant Gopinath Jadhav, M.D., Defendant Southside Gastroenterology Associates, Ltd., Defendant Petersburg Hospital Company, LLC, and Defendant Columbia/HCA John Randolph, Inc. (hereinafter "defendants"). For the reasons set forth below, the motions are granted.

Appendix C

I.

On March 13, 2006, Lokesh Vuyyuru, M.D. (hereinafter "plaintiff"), filed an *ex relatione* action on behalf of the United States pursuant to 31 U.S.C. § 3730(b)(1) and 31 U.S.C. § 3732(a). On June 27, 2006, the United States notified the Court of its decision not to intervene. Five months after the original filing, on August 29, 2006, the current shape of this case took form in the Third Amended Complaint ("TAC") filed by Plaintiff. The TAC asserts claims under the Federal False Claims Act, 31 U.S.C. § 3729, *et. seq.*, and conspiracy claims under Virginia law.

Plaintiff alleges that Gopinath Jadhav, M.D. (hereinafter "Dr Jadhav") engaged in fraudulent activity in his practice as a gastroenterologist by routinely taking unnecessary biopsies of the ileocecal valve during colonoscopies, and then charging Medicaid, Medicare, and private insurance companies for them "for the sole purpose of enhancing his income" and the income of the two hospitals for which he worked: Southside Regional Medical Center (hereinafter "SRMC") and John Randolph Medical Center (hereinafter "JRMC") (Third Am. Compl. 5).[1] The TAC also alleges that Dr. Jadhav and the two medical centers conspired to submit these fraudulent charges.

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1. Plaintiff also contends that Dr. Jadhav "frequently billed for the procedure of a colonoscopy and upper-endoscopy when Dr. Jadhav failed to complete the procedure." (Third Am. Compl. 7).

All four defendants have moved for dismissal pursuant to Fed.R.C.P. 12(b)(1) and 12(b)(6). They contend that dismissal is proper because: (1) the TAC fails to establish subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) of the False Claims Act ("FCA"); (2) the statute of limitation bars both the FCA and state law conspiracy claims; (3) the TAC fails to plead the FCA claims with specificity; (4) the TAC fails to state a claim for conspiracy under Virginia law; (5) the defendants' statutory immunity from damages bars the state law conspiracy counts; and (6) the Cameron Foundation does not have successor liability for the state-law conspiracy counts. For the reasons set forth below, there is a lack of subject matter jurisdiction and it is, therefore, unnecessary to consider the other grounds upon which dismissal is sought.

II.

"Federal courts are courts of limited jurisdiction and the 'threshold requirement in every federal case is jurisdiction.' " *Barclay Square Properties v. Midwest Federal Savings and Loan Association*, 893 F.2d 968, 969 (8th Cir.1990) (quoting *Sanders v.. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir.1987)). Title 28 U.S.C. § 1330 *et seq.* sets forth the various predicates for jurisdiction.

The plaintiff bears the burden of establishing that subject matter jurisdiction exists. *See, e.g., Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir.1999) ("In this appeal, Jones challenges the district court's determination that it lacked subject matter jurisdiction

over his ADA claims against the Defendants. Jones has the burden of proving the existence of subject matter jurisdiction"); *Evans v. B.F. Perkins Co.*, 166 F .3d 642, 647 (4th Cir.1999) ("The plaintiff has the burden of proving that subject matter jurisdiction exists"); *Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir.1991) ("When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff"). Here, plaintiff has failed to meet this burden.

A.

Plaintiff alleges in the TAC that the Court has federal question jurisdiction under 31 U.S.C. § 1331 because plaintiff makes his primary claims under the FCA, a federal statute. That statute, however, forecloses the exercise of jurisdiction:

> over an action . . . based upon the public disclosure of allegations or transactions . . . from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4); *Rockwell Int'l Corp. v. United States*, __ U.S. __, 2007 WL 895257, *4 (Mar. 27, 2007). Courts interpreting this portion of the statute have concluded that courts must dismiss complaints brought under the FCA where a complaint is: "(1) 'based upon'

information (2) that was 'publicly disclosed' and (3) [the plaintiff] was not the 'original source' of the information." *Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 582 (4th Cir.2000); *see also U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.1994)(laying out the same three requirements for proper dismissal). All three requirements for dismissal are met in this case.

1.

In *U.S. ex. rel. Siller v. Becton Dickinson & Co.*, the Fourth Circuit concluded that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Siller*, 21 F.3d at 1348. "Such an understanding of the term . . ." the court continued, "is fully consistent with section 3730(e)(4)'s indisputed objective of preventing 'parasitic' actions." *Id.* Indeed, if relators were permitted to bring cases based upon facts or allegations derived from publicly available information, they would not be "sounding the alarm, but echoing it," which would do "nothing to further the government's efforts to ferret out fraud." *U.S. ex. rel. Detrick v. Young*, 909 F.Supp. 1010, 1020-21 (E.D.Va.1995). Reviewing the information that was publicly available at the time a relator filed his claim, and assessing the similarity between that information and the relator's allegations, therefore, are critical steps in determining whether a court has jurisdiction over the relator's claim.

In this case, there is substantial evidence that plaintiff's allegations are derived from public disclosures. Almost a year before plaintiff filed his complaint, the Virginia Times published a front page article entitled "Alleged insurance, quality-of-care fraud at SRMC." Dorothy Rowley, *Alleged Insurance Quality-of-Care Fraud at SRMC*, Va. Times, March 30, 2005, at A-1. The article discussed allegations about defendant Dr. Gopinath Jadhav's ethics and medical practice. In the ninth paragraph, for instance, the article noted:

> Nursing sources who worked with Jadhav, said ... that Jadhav often performed medical procedures too quickly—usually without doing a thorough examination first, colonoscopies in less than five minutes and biopsies of the ileocecal valve. This kind of thing, according to the source, resulted in the doctor allegedly engaged in billing to increase his billing revenue—including Medicaid and Medicare for unnecessary procedures.

Id. The allegations discussed in this paragraph are substantially similar to those found in paragraphs 17-27 of plaintiff's Third Amended Complaint (filed over a year later on August 30, 2006).[2] In paragraph 27 of that complaint, for instance, plaintiff alleges:

---

2. Plaintiff's first complaint was also filed well after the Virginia Times articles discussed above. It was filed on March 13, 2006.

> Additionally, Dr. Jadhav frequently billed for the procedure of a colonoscopy and upper-endoscopy when Dr. Jadhav failed to complete the procedure. The time expended by Dr. Jadhav for a colonoscopy were at times less than five minutes and for a upper-endoscopy less than three minutes [sic]. . . .

Paragraph 20 alleges:

> Dr. Jadhav conspired with SRMC and JRMC to perform the unnecessary medical procedures with the purpose of charging Medicaid and Medicare as well as private insurance companies for the unnecessary medical procedure for the sole purpose of enhancing his income and that of SRMC and JRMC.

The remarkable similarities between the news article and the allegations contained in these paragraphs are significant proof that the latter are "actually derived" from the former.

With even greater similarity to plaintiff's later filed complaint, a March 30, 2005 editorial in the Virginia Times contained the following information:

> There have been multiple complaints brought against Dr. Gopinath Jadhav. We asked for an investigation through the attorney general's office, the governor's office and the state

board of medicine. These are three main points concerning Dr. Jadhav [sic]:

- He did colonoscopies in less than five minute, when they normally take 15 minutes.
- He biopsies ileocecal walls as lipomas; and
- The hospital knows this, and despite having brought it to their attention, they suppressed the person who brought the information to the attention of the administration. Same story with the hospital's nursing staff.

Editorial, *From the Publisher*, Va. Times, March 30, 2005, at A-8. Here too, the allegations in this editorial closely resemble those made by plaintiff in the complaint he filed almost a year later.

The Virginia Times also published at least five additional articles before March 13, 2006, the date on which plaintiff filed this action, about problems related to Dr. Jadhav, the JRMC, and the SRMC. *See, e.g.*, Dorothy Rowley, *SRMC 'Guilty' According to CMS Decision*, Va. Times, April 6, 2005, at A-1, A-8; Editorial, *Talk About Conducting An Investigation*, Va. Times, April 13, 2005, at A6; Sylvina Poole, *Physicians' Alleged Misdoings Often Leave Committees With Tied Hands*, Va. Times, April 20, 2005, at A-1, A-5; Dorothy Rowley & Michael Forbes, *JRMC Upset Over Articles, Another Patient Accuses Jadhav*, Va. Times, April 27, 2005, at A-1, A-8; Dorothy Rowley, *Hospitals Indulging in*

Fraud; Why?, Va. Times, March 4, 2005, http://www.virginiatimes.org/article-46.shtml/. All of these articles constitute "public disclosures" under the FCA, which states that information "from the news media" may be considered "publicly disclosed." 31 U.S.C. § 3730(e)(4)(A).

The close similarities between these several news articles and the allegations contained in plaintiff's later filed complaint constitute convincing evidence that the allegations in his *qui tam* action are "actually derived" from those articles, particularly because plaintiff's pleadings do not offer any explanation about how or when he became aware of the alleged fraudulent activity at issue in this case. While plaintiff, in his opposition brief, denies that his allegations are based upon the Virginia Times articles, he does not offer any evidence, other than a post hoc conclusory affidavit stating that he complained about defendant Dr. Jadhav to the FBI prior to the Virginia Times articles, that would allow the Court to adopt his position. He does not provide the dates of any these alleged meetings, the names of the FBI agents with whom he met, or any information about the content or results of these meetings. Even at the oral argument held on January 26, 2007, plaintiff's counsel could not provide any details about these meetings.

Thus, faced with over ten news articles published almost a year before this action, the significant similarity between those articles and the TAC, and a dearth of evidence from the plaintiff documenting the source of

the allegations in the TAC, the Court concludes that the allegations of the TAC were "actually derived from" these public disclosures. *Siller*, 21 F.3d at 1348.

2.

Considering the strong evidence that the allegations in this case appear to be derived from a prior public disclosure, under the jurisdictional requirements of the FCA, the plaintiff must demonstrate that he is an "original source" of the allegations. 31 U.S.C. § 3730(e)(4). Otherwise, the Court must dismiss the action for lack of subject matter jurisdiction. *Rockwell*, 2007 WL 895257; *Siller*, 21 F.3d at 1348; *Grayson*, 221 F.3d at 582-83. Again, this is to ensure that plaintiff's case is not the type of parasitic lawsuit that Congress designed § 3730(e)(4) to prevent. *Siller*, 21 F.3d at 1348.

To have "original source" status, a relator must demonstrate that he: (1) had "direct and independent knowledge of the information on which the allegations are based," and (2) "voluntarily provided the information to the Government before filing an action" under the FCA. 31 U.S.C. § 3730(e)(4)(B); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir.1999). In order to do so, he must:

> [A]llege specific facts—as opposed to mere conclusions—showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations

> with competent proof. Only in this way will the district court be able to adequately identify legitimate *qui tam* actions and weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research.

Id. Further, as the Eighth Circuit noted in *United States ex. rel. Hays v. Hoffman*, the plaintiff bears the burden of proving that he is the "original source" for *each* alleged fraudulent claim. *United States ex. rel. Hays v. Hoffman*, 325 F.3d 982-990 (8th Cir.2003). Here, the plaintiff has not established that he is entitled to "original source" status.

a.

First, plaintiff consistently has failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the TAC. Instead, in that complaint, he merely states that he was, over a span of several years, a member of the Committee for Gastroenterology, a member of the Department of Medicine, a member of the Endoscopy Committee, and a member of the investigating committee member for peer review . . . for the medical charts of Dr. Jadhav" at Southside Regional Medical Center, and also a director and assistant director of Gastroenterology at John Randolph Medical Center. (Third Am. Compl. 4). While these positions might indicate how it may have been *possible* for him to obtain the information contained in his allegations, they do not show " *exactly how and when*

he . . . obtained direct and independent knowledge of the fraudulent acts alleged" in his complaint. *Id.* (emphasis added). Without such specific facts, and in light of the earlier public disclosures, this Court simply cannot make a finding that the plaintiff was an original source of the allegations in this case.

b.

Second, plaintiff does not provide specific facts about the *allegations* in the TAC, such that the Court could determine that he was the original source of them. For instance, one of the central allegations is that the defendants were involved in Medicaid, Medicare, and other forms of billing fraud. Plaintiff does not, however, provide a single specific instance of such billing fraud. Instead, in lieu of offering specifics, he merely asserts that (1) it occurred, and (2) was "improper and fraudulent." His attorney admitted this during oral argument at the January 26, 2007 hearing:

> The Court: . . . Where is there a specific bill or set of bills, or a series of bills, that by identity, by quantity, by date, that it is alleged to be fraudulent? It is not there, is it?
>
> Mr. Roberts: No, sir, he does not allege in that fashion.

Transcript of January 27, 2007 Oral Argument at 37-38.

Similarly, the plaintiff has not provided any correlation between the fraudulent billing that he alleges occurred at JRMC and SRMC and the fraudulent practices that he alleges defendant Dr. Jadhav engaged in. At the January 26, 2007 hearing, for instance, the following exchange took place between the Court and plaintiff's attorney:

> The Court: Did he correlate . . . the billing with the doing of this . . . Yes or no? Did he correlate them?
>
> Mr. Roberts: I don't know that I can answer that question, Your Honor.

Transcript of January 27, 2007 Oral Argument at 53.

In light of the generalities and conclusory statements that permeate the TAC and the plaintiff's briefs on the jurisdictional issue, the Court cannot making a finding that plaintiff had "direct" knowledge of the allegations in the TAC apart from what appeared in the public domain well before the TAC was filed. *See, e.g., United States ex. rel. Reagan v. East Ex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 179 (5th Cir.2004) (concluding that the plaintiff was not an original source because she "took disclosures that had already been investigated and reported . . . and, based on her own experience, claimed that they were fraudulent"); *Hafter*, 190 F.3d at 1163 (denying plaintiff original source status because of a lack "specific, particularized fact allegations showing which fraudulent

activities" the plaintiff had witnessed, "how he witnessed them and when").

c.

Third, even though the plaintiff asserts in the TAC, that he "lea[r]ned that certain fraudulent practices were occurring at John Randolph Medical Center and at Southside Regional Medical Center, and objected to those practices and also notified government authorities," he failed to provide the necessary dates and details that might permit the Court to accept his claim. Indeed, the statement is a conclusory one. It does not demonstrate *how* plaintiff learned about such practices, and information of that specificity is imperative to making a finding that plaintiff is an original source. *Id.*

Plaintiff, therefore, cannot prove that he was an original source of the allegations in the TAC. He has had ample opportunity to supply the Court with the "specific facts—as opposed to mere conclusions—showing how and when he . . . obtained direct and independent knowledge of the fraudulent acts" that he alleges in his complaint, and to "support those allegations with competent proof." *Hafter*, 190 F.3d at 1162-63. He has, however, utterly failed to do so. He did not provide specific facts in his first complaint. He did not provide specific facts in his amended complaint. He did not provide specific facts in either his second, or third amended complaints. Moreover, when given the opportunity to provide specific facts, and then called

upon to do so by the Court at the January 27, 2007 hearing, plaintiff could provide one.[3] On this record, it must be concluded that the plaintiff is not an original source of the allegations in the TAC.

3.

Overall, therefore, plaintiff fails to meet the jurisdictional requirements of 31 U.S.C. § 3730(e)(4). The defendants have produced sufficient evidence for the Court to make a finding that the plaintiff's allegations are based on the Virginia Times articles published before the plaintiff's complaint. Further, plaintiff has not demonstrated the specific facts required

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3. Additionally, prior to the January 27, 2007 hearing on the defendants' Motions to Pursuant to Rules 12(b)(1) and 12(b)(6), the plaintiff did not request a period of discovery in order to respond to that motion, or an evidentiary hearing to prove jurisdiction. Transcript of January 27, 2007 Oral Argument at 67-69. Only at the end of that hearing, after failing to provide any specific facts in response to the Court's request to do so at the hearing, did plaintiff request more time to provide them. Plaintiff, however, had over ten months to provide such facts. He filed four different iterations of a complaint. He also was on notice for over three months that defendants were challenging subject matter jurisdiction in this case. Indeed, defendants' Motions to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) were filed on October 6, 2007, and a hearing on this motion was not held until January 26, 2007. Plaintiff, therefore, had ample opportunity to gather the type of evidence required to demonstrate to the Court that subject matter jurisdiction exists in this case. He did not gather any. He is not, therefore, entitled to more time to do so.

for the Court to grant him "original source" status. Hence, the Court lacks subject matter jurisdiction under the FCA and thus lacks federal question subject matter jurisdiction over this case. 31 U.S.C. § 3730(e)(4).

B.

Additionally, the Court does not have diversity jurisdiction under 28 U.S.C. § 1332. There is not complete diversity between plaintiff and the various defendants because both plaintiff and, for instance, defendant Dr. Jadhav, are Virginia residents. In *Wisconsin Department of Corrections v. Schact*, 524 U.S. 381, 388 (1998), the Court held that "[a] case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same State." Further, "[t]he presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect, or consent to jurisdiction. No court can ignore the defect; rather, a court, noticing the defect, must raise the matter on its own." *Id.* at 389 (citations omitted).

Appendix C

CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss will be granted, and the action will be dismissed for lack of subject matter jurisdiction.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: March 28, 2007

APPENDIX D — ORDER (No. 07-1922 (L)) OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 10, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-[1922] (L)
(3:06-cv-00180-RLW)

UNITED STATES OF AMERICA, ex rel.
Lokesh Vuyyuru,

Plaintiff - Appellant

v.

GOPINATH JADHAV, M.D.; SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LIMITED; COLUMBIA/HCA JOHN RANDOLPH, INCORPORATED; PETERSBURG HOSPITAL COMPANY, LLC; CAMERON FOUNDATION, a Virginia non-profit corporation,

Defendants - Appellees

and

SEALED DEFENDANT 1; SEALED DEFENDANT 2; SEALED DEFENDANT 3; SEALED DEFENDANT 4; SEALED DEFENDANT 5; COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES, INCORPORATED; PETERSBURG HOSPITAL, INCORPORATED,

Defendants

v.

Appendix D

SEALED MOVANT; UNITED STATES OF AMERICA; JOHN REYNOLDS, Doctor,

Movants

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35.

The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E — ORDER (No. 07-1455 (L)) OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 10, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-1455 (L)
(3:06-cv-00180-RLW)

UNITED STATES OF AMERICA, ex rel. Lokesh Vuyyuru,

Plaintiff - Appellant

v.

GOPINATH JADHAV, M.D.; SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LIMITED; COLUMBIA/HCA JOHN RANDOLPH, INCORPORATED; PETERSBURG HOSPITAL COMPANY, LLC; CAMERON FOUNDATION, a Virginia non-profit corporation,

Defendants - Appellees

and

SEALED DEFENDANT 1; SEALED DEFENDANT 2; SEALED DEFENDANT 3; SEALED DEFENDANT 4; SEALED DEFENDANT 5; COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES, INCORPORATED; PETERSBURG HOSPITAL, INCORPORATED,

Defendants

v.

Appendix E

SEALED MOVANT; UNITED STATES OF AMERICA; JOHN REYNOLDS, Doctor,

Movants

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35.

The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

137 (1)

No. 09-46

Supreme Court, U.S.
FILED
AUG 12 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. LOKESH VUYYURU,
Petitioner,

v.

GOPINATH JADHAV, M.D.; SOUTHSIDE GASTROENTEROLOGY ASSOCIATES, LIMITED; COLUMBIA/HCA JOHN RANDOLPH, INCORPORATED; PETERSBURG HOSPITAL COMPANY, LLC; THE CAMERON FOUNDATION, A VIRGINIA NON-PROFIT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in ruling that the district court did not commit clear error in finding that Petitioner's False Claims Act claims were "based upon" publicly disclosed allegations or transactions under 31 U.S.C. § 3730(e)(4)(A)?

2. Did the court of appeals err in ruling that the district court did not abuse its discretion in finding that Petitioner's claims were "clearly frivolous" under 31 U.S.C. § 3730(d)(4)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Hercules Holding II, LLC, HCA Inc., Healthtrust, Inc. – The Hospital Company, Healthserv Acquisition, LLC, and HCA Health Services of Virginia, Inc. are the parent companies of Columbia/HCA John Randolph, Inc., and that no publicly held company owns 10% or more of its stock. Undersigned counsel further state that Community Health Systems, Inc., a publicly held company, owns one hundred percent of the stock of CHS/Community Health Systems, Inc., which in turn owns one hundred percent of the membership interests of Virginia Hospital Company LLC, which in turn owns the majority of the membership interests of Petersburg Hospital Company, LLC.

The Cameron Foundation and Southside Gastroenterology Associates, Ltd. have no parent companies, and no publicly held companies own 10% or more of their respective stock.

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OPINIONS BELOW

This is an opposition to a petition for a writ of *certiorari* from an opinion entered February 12, 2009 by the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the Eastern District of Virginia and dismissing Petitioner's Third Amended Complaint ("Complaint") for lack of subject matter jurisdiction. That opinion is reported at *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337 (4th Cir. 2009) and is included in Petitioner's Appendix A. The opinions issued by the district court are unpublished, but are electronically reported at *United States ex rel. Vuyyuru v. Jadhav*, Civil Action No. 3:06-cv-180, 2007 WL 951851 (E.D. Va. March 28, 2007) and *United States ex rel. Vuyyuru v. Jadhav*, Civil Action No. 3:06-cv-180, 2007 WL 2471087 (E.D. Va. August 27, 2007). The district court opinions are included in Petitioner's Appendices B and C.

STATEMENT OF THE CASE

A. BACKGROUND

Petitioner Lokesh Vuyyuru is a gastroenterologist whose license to practice medicine was revoked by the Virginia State Board of Medicine (the "Board"). The Board summarily suspended Petitioner's license in 2005 "based upon its finding that his continued practice of medicine could be a substantial danger to the public health and safety . . . ." *Vuyyuru v. Virginia Board of Medicine*, Record No. 0610-07-2, 2008 WL 122804, *1 (Va. App. Jan. 15, 2008). The following year, the Board

permanently revoked Petitioner's license finding, among other things, that his "misconduct led to the performance of unnecessary medical procedures, physical harm to patients and, in one case, a patient's death." *Id.*

In retaliation, Petitioner commenced a series of lawsuits in the district court below against everyone involved in his disciplinary proceedings:

- He filed a $25 million conspiracy lawsuit against two Board investigators, alleging they conspired for the (alternatively imagined) purposes "to hinder his efforts to present evidence to a grand jury and to silence his criticism of the Virginia Board of Medicine and, Dr. Jadhav, or Southside Regional Medical Center or John Randolph Community Center and other powerful and/or influential individuals." *Vuyyuru v. Hardy, et al.*, Civil Action No. 3:06cv179 (E.D. Va. filed Mar. 13, 2006), at Complaint ¶ 22. The district court ultimately dismissed this lawsuit pursuant to the *Younger* doctrine. Order (Nov. 16, 2006).

- He filed a § 1983 lawsuit against the Board, its members, including Respondent Dr. Jadhav, two former Attorneys General of the Commonwealth of Virginia, six attorneys in the Office of the Attorney General and a host of Board personnel, including the two investigators.

Vuyyuru v. The Virginia Medical Board et al., Civil Action No. 3:08cv301 (E.D. Va. filed May 19, 2008). The district court dismissed this lawsuit, finding it "a rambling and largely-incoherent recitation of unclear allegations" that comprise "a confusing amalgamation of vague assertions against the [Board] and certain other defendants." Memorandum Order (Oct. 31, 2008) at 1, 3.

- He filed yet another lawsuit against Respondents Dr. Jadhav and his practice group, Southside Gastroenterology Assocs., Ltd., seeking $95 million. This lawsuit also names 35 additional defendants including witnesses who testified at one of the peer review disciplinary proceedings, the hearing officers for that proceeding, as well as counsel involved in the proceeding. *Vuyyuru v. Jadhav et al.*, Civil Action No. 3:09cv149 (E.D. Va. filed Mar. 16, 2009). Petitioner's counsel in that lawsuit recently advised the district court that she is conducting a "Rule 11 review" to ascertain the "basis in law or fact" for Petitioner's claims and conceded that the complaint "may require substantial amendments." Plaintiff's Memorandum in Support of Motion to Extend Time to Serve Defendants (filed July 14, 2009) at 2, 3.

This lawsuit is part and parcel of that campaign of harassment. In addition to Dr. Jadhav, against whom this is Petitioner's third lawsuit, Respondents include the entities that operate two hospitals, Southside Regional Medical Center ("SRMC") and John Randolph Medical Center ("JRMC"). Petitioner's privileges to practice were revoked at SRMC, and suspended at JRMC prior to the suspension and eventual revocation of his medical license.

B. The *Virginia Times* Articles

In March 2005, a year before Petitioner filed this lawsuit, the *Virginia Times* newspaper published a front-page article titled "Alleged insurance, quality-of-care fraud at SRMC." Authored by staff writer Dorothy Rowley, the article asserted that Respondent Dr. Jadhav engaged in Medicare and Medicaid fraud at SRMC by unnecessarily performing certain medical procedures. The article cited "[n]ursing sources who worked with Jadhav"—not Petitioner—as the source for its assertions. The *Virginia Times* thereafter published in 2005 several other articles alleging fraudulent Medicare and Medicaid billing by Dr. Jadhav, SRMC and JRMC.

C. The Complaint And Petitioner's Original Declaration

Petitioner commenced this suit the following year in March 2006. His Complaint repeated the allegations in the *Virginia Times* articles and sought to allege on behalf of the United States three counts

under the False Claims Act (the "FCA") predicated on alleged unnecessary medical procedures by Dr. Jadhav. The Government declined to participate in the suit.

The Complaint did not identify any specific false statements or bills that Respondents made or submitted to the United States. Nor did the Complaint allege that Petitioner had direct and independent knowledge of Respondents' billings. The Complaint alleged instead that Petitioner "learned" that through "March of 2005," Dr. Jadhav performed certain medical procedures unnecessarily. The Complaint then speculated "[u]pon information and belief"—without providing the basis for such belief—that Respondents billed the United States for unnecessary procedures.

Petitioner amended and restated his Complaint three times. None of those amendments altered the conclusory nature of Petitioner's FCA claims. None identified any actual fraudulent billings by Respondents. None alleged that Petitioner had direct and independent knowledge of Respondents' billings.

Petitioner's statement of supporting information that accompanied the Complaint was conclusory as well. The FCA requires prospective relators to provide the Government "all material evidence and information related to the complaint." 31 U.S.C. § 3730(b)(2). Petitioner filed with his Complaint a declaration (the "First Declaration") to satisfy that requirement. Absent from the First Declaration were any bills or statements from

Respondents. The First Declaration was limited instead to partial medical records for several patients and a handful of articles that Petitioner claims showed that those persons received unnecessary procedures.

D. Respondents' Motions To Dismiss

Respondents moved to dismiss the FCA claims on various grounds including lack of subject matter jurisdiction. Respondents argued that the district court lacked subject matter jurisdiction over the FCA claims pursuant to 31 U.S.C. § 3730(e)(4)(A) because those claims were "based upon" the *Virginia Times* articles and Petitioner was not an "original source."

Attached to the memorandum in support of the motions to dismiss were copies of the *Virginia Times* articles. Also attached was a copy of Petitioner's deposition testimony in a defamation lawsuit arising from *Virginia Times* articles. When asked in that deposition whether he was the source for articles in the paper, Petitioner stated "No . . . . [the reporters] publish these articles talking to various people . . . ."

E. Petitioner's Opposition To The Motions To Dismiss

Petitioner's brief in opposition to the motions to dismiss did not contest that his FCA claims were based upon the *Virginia Times* articles. Petitioner argued instead that he qualified as an "original source" because he possessed direct and independent

knowledge of Respondents' alleged false billings. Petitioner's brief, however, stated no facts substantiating that assertion. Petitioner's brief proffered various bases for Petitioner's belief that Dr. Jadhav performed unnecessary medical procedures, but it was silent about a necessary predicate for the FCA claims—namely, the submittal of false claims or statements to the Government for those procedures.

The declaration that Petitioner provided with his opposition brief (the "Second Declaration") was likewise devoid of such substantiation. The Second Declaration asserted in vague terms that Petitioner spoke with the FBI and several Assistant United States Attorneys regarding "improper medical procedures . . . and billing fraud at both SRMC and JRMC" prior to 2005. The Second Declaration, however, did not identify specific bills or statements by Respondents that were fraudulent. Nor did it aver that Petitioner had direct and independent knowledge of Respondents' billings.

F. The District Court's Hearing On The Motions To Dismiss

The district court heard argument on the motions to dismiss on January 26, 2007, nearly four months after the motions were filed. Only moments before the hearing, Petitioner served on Respondents and filed with the district court another declaration (the "Third Declaration"). The district court struck the Third Declaration as untimely—a ruling Petitioner did not challenge on appeal—but the Third Declaration did not cure the deficiencies in

Petitioner's proof in any event. It identified no actual fraudulent billings by Respondents. Nor did it substantiate or even aver that Petitioner had direct and independent knowledge of Respondents' billings.

During the hearing—as in his brief—Petitioner did not challenge that his FCA claims were "based upon" the *Virginia Times* articles and focused instead on whether he had direct and independent knowledge of Respondents' allegedly false billings to the Government and was thus an "original source." His counsel acknowledged at the hearing, however, that Petitioner lacked any knowledge or evidence of actual fraudulent bills submitted by Respondents. All Petitioner proffered was that he believed Dr. Jadhav performed unnecessary or inadequate procedures, but he could not bridge the gap necessary for a FCA claim. He could not correlate any allegedly fraudulent bills with any of Dr. Jadhav's allegedly improper procedures.

G. The District Court's Opinion

On March 28, 2007, the district court held that it lacked subject matter jurisdiction over the FCA claims. Applying Fourth Circuit precedent, the district court found that the FCA claims were "actually derived from" the *Virginia Times* articles. In making this finding, the district court considered the significant similarities between those articles and Petitioner's allegations. The district court did not limit its consideration to those similarities, however. The district court also considered that

notwithstanding multiple amendments to his Complaint and multiple declarations, Petitioner provided no evidence establishing a source for his allegations of false billing to the Government. As the district court found, Petitioner "could not offer any evidence, other than a post hoc conclusory affidavit stating that he complained about the defendant Dr. Jadhav to the FBI prior to the *Virginia Times* articles, that would allow the Court to adopt his position." (Opinion at 74a, Petitioner's Appendix C.)

The district court further found that Petitioner had not carried his burden of demonstrating that he was an "original source" of the FCA claims—that is, that he had direct and independent knowledge of the allegedly false billings to the Government. The district court found that despite "filing four different iterations of a complaint," Petitioner: (a) "consistently has failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Complaint];" (b) "does not provide specific facts about the *allegations* in the [Complaint];" and (c) "has not provided any correlation between the fraudulent billing that he alleges occurred" at SRMC and JRMC and "the fraudulent practices that he alleges defendant Dr. Jadhav engaged in." (Opinion at 76a-78a, Petitioner's Appendix C.)

H. The District Court's Award Of Attorneys' Fees

The Cameron Foundation (a charity established to receive and administer the proceeds

from the sale of SRMC by its prior owner) filed a motion for attorneys' fees pursuant to 31 U.S.C. § 3730(d)(4) following the district court's dismissal of the FCA claims. The motion sought fees on the grounds that the FCA claims were clearly frivolous and vexatious. The district court agreed that the FCA claims were clearly frivolous and awarded fees in the amount of $68,228.75. In doing so, the district court reiterated that Petitioner:

> 'failed to provide specific facts about how he obtained knowledge of the fraudulent acts alleged in the [Complaint],' failed to provide specific facts about his allegations so that the Court could determine that he was their original source, and failed to provide the 'necessary dates and details' to support his claim that fraudulent practices were occurring at John Randolph Medical Center and Southside Regional Medical Center.

(Opinion at 60a, Petitioner's Appendix B.)

Petitioner filed another declaration (the "Fourth Declaration") in connection with The Cameron Foundation's fee application. Although not considered by the district court in its ruling dismissing the FCA claims, the Fourth Declaration stated conclusorily that Petitioner had spoken with the "United States Attorney's General Office" and unnamed FBI agents. But like its predecessors, the Fourth Declaration identified no actual false bills or statements submitted by Respondents. The Fourth Declaration also did not aver that Petitioner had

direct and independent knowledge of Respondents' billings, much less provide facts on which any such assertion could rest.

Attached to the Fourth Declaration was a letter from the Department of Justice that Petitioner contends substantiates his position. The letter, however, is merely an offer of limited use immunity in exchange for a proffer by Petitioner. The letter makes no mention of false claims. Nor does the letter reveal whether Petitioner accepted the offer, whether he made a proffer, the content of any such proffer (if he made one), and whether he had direct and independent knowledge of anything he may have proffered.

Petitioner thereafter tendered another declaration (the "Fifth Declaration"). The Fifth Declaration attempted to introduce information from the disallowed Third Declaration. The district court struck the Fifth Declaration, a ruling not challenged on appeal.

I. Petitioner's Appeal To The Fourth Circuit

Petitioner appealed both the dismissal order and the award of attorneys' fees. Though he had not argued this before the district court, Petitioner argued before the Fourth Circuit that his FCA claims were not "based upon" the *Virginia Times* articles. Even then, Petitioner did not argue that the district court applied the wrong standard in construing the "based upon" requirement. Petitioner instead took issue with the district court's view of

the facts. Specifically, Petitioner objected to the conclusions the district court drew in finding that the FCA's claims were "actually derived from" the *Virginia Times* articles.

On February 12, 2009, the Fourth Circuit issued an opinion affirming the district court's decision on all issues. (*See* Opinion at 3a, Petitioner's Appendix A.) Applying a clearly erroneous standard, with which Petitioner does not take issue, the Fourth Circuit affirmed the district court's findings of fact that:

- The FCA claims were "actually derived" from "the public disclosure of allegations from the news media." (Opinion at 29a, Petitioner's Appendix A.); and

- Petitioner did not prove that he had direct and independent knowledge of the allegations of fraudulent billings. (Opinion at 37a, Petitioner's Appendix A.)

The appellate court reasoned that the district court's findings on those matters were not clearly erroneous in light of numerous considerations, including: the substantial similarity between the *Virginia Times* articles and Petitioner's Complaint; Petitioner's denial in sworn testimony that he was a source of articles in the *Virginia Times*; Petitioner's inability to specify a single false claim or statement; and, Petitioner's repeated failure to explain how he had direct and independent knowledge of

Respondents' billings. (Opinion at 25a-37a, Petitioner's Appendix A.)

The Fourth Circuit also affirmed the attorneys' fee award to The Cameron Foundation. (Opinion at 37a, Petitioner's Appendix A.) The appellate court held, based on the evidence in the record, that the district court did not abuse its discretion in finding as clearly frivolous Petitioner's claim that he was a proper relator. (Opinion at 40a, Petitioner's Appendix A.) The appellate court also affirmed the amount of the award, a ruling Petitioner does not challenge here. (Opinion at 42a, Petitioner's Appendix A.)

Petitioner moved for reconsideration and rehearing *en banc*. The Fourth Circuit denied those petitions. (Orders at 83a, 86a, Petitioner's Appendices D and E.)

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT APPLIED EXISTING CIRCUIT LAW TO THE PARTICULAR FACTS OF THIS CASE, GIVING RISE TO NO IMPORTANT QUESTION AND GIVING RISE TO NO CIRCUIT SPLIT

In the first and second assignments of error, Petitioner contends that the FCA's public disclosure bar was not triggered by the *Virginia Times* articles because the evidence did not show that his FCA claims were "based upon" the articles. *See* 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over

an action under this section *based upon* the public disclosure of allegations or transactions. . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.") (emphasis added). The Fourth Circuit reviewed the district court's jurisdictional findings of fact under the clearly erroneous standard of review. (Opinion at 25a, Petitioner's Appendix A.) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). After reviewing all of the evidence, the Fourth Circuit determined that the district court did not commit clear error in holding that the FCA claims were "based upon" the allegations in the *Virginia Times*. The only question properly before this Court, therefore, is the non-certworthy one of whether the district court committed clear error in its jurisdictional findings of fact. Petitioner asserts no error in those findings that warrants this Court's review.

A. The Fourth Circuit Did Not Hold That Petitioner Had To Prove He Was The Source Of The *Virginia Times* Articles

In his first assignment of error, Petitioner complains that the Fourth Circuit required him to produce evidence that he was the source of the allegations in the *Virginia Times* to avoid application of the public disclosure bar. Petitioner argues that the Fourth Circuit held that a *qui tam* relator must prove that he is the source of a public disclosure to show that his Complaint is not "based upon" publicly disclosed allegations. Based on this alleged holding, Petitioner argues that the Fourth

Circuit's ruling conflicts with the Supreme Court's holding in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). Petitioner misreads the Fourth Circuit's opinion.

The Fourth Circuit did not hold that Petitioner had to prove that he was the source of the *Virginia Times* articles to show that his FCA claims were not "based upon" public disclosures. To the contrary, the Fourth Circuit followed long-standing circuit precedent, and held that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." (Opinion at 26a, Petitioner's Appendix A.) (quoting *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994)). This is the precise substantive standard Petitioner advocates.

The portion of the Fourth Circuit's opinion to which Petitioner points is not an articulation of the applicable standard, but a comment on Petitioner's argument. Petitioner invited the Fourth Circuit's discussion of whether he was the source of the *Virginia Times* articles by arguing on brief that the district court erred in applying the "derived from" standard in *Siller* because Petitioner might have been the source of the articles. (Opening Brief of Appellant/Petitioner in the United States Court of Appeals for the Fourth Circuit ("Opening Brief") at 32-33.) In response to that suggestion, the Fourth Circuit observed that it was Petitioner's burden to prove "the necessary jurisdictional facts" and questioned why, as a manner of carrying that

burden, he "did not simply offer his own sworn statement to the district court unequivocally stating that he was the primary source for the *Virginia Times* Article," despite his previous testimony to the contrary. (Opinion at 28a, Petitioner's Appendix A.) In making that observation, the Fourth Circuit never held that Petitioner failed to satisfy his burden of proof because he did not show that he was the source of the articles.

Additionally, the Fourth Circuit's opinion does not conflict with the Supreme Court's decision in *Rockwell*. *Rockwell* addressed the "original source" analysis under 31 U.S.C. § 3730(e)(4)(B), not the "based upon" analysis under 31 U.S.C. § 3730(e)(4)(A), and thus the holding in *Rockwell* has little or no relevance here. *See Rockwell*, 549 U.S. at 470-72; 31 U.S.C. § 3730(e)(4)(B) ("'[O]riginal source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."). The question in *Rockwell* was whether "the phrase 'information on which the allegations are based' refer[s] to the information on which the relator's allegations are based or the information on which the publicly disclosed allegations that triggered the public-disclosure bar are based." *Rockwell*, 549 U.S. at 470. The Court held that it was the former. *Id.* at 470-71.

The Fourth Circuit's opinion in this case is in perfect harmony with *Rockwell*. (*See* Opinion at 22a, Petitioner's Appendix A (citing *Rockwell*, 549 U.S. at

471-72).) The Fourth Circuit did not hold that Petitioner had to have direct and independent knowledge of the information on which the *Virginia Times* articles were based to prove that he was an "original source." Even a cursory review of the Fourth Circuit's opinion reveals that the court's "original source" analysis examined whether Petitioner had direct and independent knowledge of the allegations in the Complaint, not the *Virginia Times* articles. (*See* Opinion at 31a-34a, Petitioner's Appendix A.)

B. This Case Is Not A Plausible Vehicle For Resolving The Circuit Split Identified By Petitioner Because He Lost On Factual Arguments Under The Minority View He Advocates And Would Lose Even More Decisively Under The Majority View

In Petitioner's second assignment of error, he argues that the Fourth Circuit departed from its holding in *Siller* that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Siller*, 21 F.3d at 1348. That assignment too misreads the Fourth Circuit's opinion below.

In upholding the dismissal of Petitioner's FCA claims, the Fourth Circuit expressly followed its holding in *Siller*, reviewing for clear error "the district court's finding that the allegations of the Third Amended Complaint pertaining to the FCA

claims were based upon, *i.e.*, actually derived from, the *Virginia Times* articles." (Opinion at 26a, Petitioner's Appendix A.) The majority and the dissent disagreed not with respect to whether *Siller* controlled, but only as to whether the district court committed clear error in making its jurisdictional findings. (*See* Opinion at 47a, Petitioner's Appendix A (Reidinger, J., dissenting).)

Moreover, this matter is not an appropriate occasion to resolve the circuit split referenced by Petitioner (Petition at 14-15), because the Fourth Circuit's holding would be proper under either outcome. The majority of circuits have rejected the "derived from" interpretation articulated in *Siller*, and have instead held that "a relator's FCA complaint is 'based upon' publicly disclosed allegations or transactions when the allegations in the relator's complaint are substantially similar to publicly disclosed allegations." *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 914-20 (7th Cir. 2009) (discussing circuit split and collecting cases). Petitioner argues for application of the minority interpretation of "based upon" that the Fourth Circuit followed in the opinion below, which he did not satisfy. Application of the majority interpretation would be even less favorable to Petitioner. It is indisputable that the allegations in the Complaint were substantially similar to the allegations in the *Virginia Times*, and, thus, would be sufficient to trigger the public disclosure bar under the majority interpretation of 31 U.S.C. § 3730(e)(4)(A). The issue presented by Petitioner is whether the Fourth Circuit misapplied its own minority standard in holding that the district court

did not commit clear error. That is not a proper case in which to address a circuit split.

Petitioner also misapprehends the Fourth Circuit's opinion in suggesting that the court held the similarity between the FCA allegations in the Complaint and the *Virginia Times* articles was sufficient to trigger the public disclosure bar. The Fourth Circuit cited a number of factors, in addition to the similarities between the allegations, that supported a finding that the FCA claims were actually derived from the *Virginia Times* articles: (1) the articles preceded the filing of the *qui tam* action by nearly a year; (2) Petitioner denied under oath in a deposition that he was the source of the articles; and (3) Petitioner offered no evidence that he was the source of the articles. (Opinion at 26a-27a, Petitioner's Appendix A.) It was not simply the similarity of the allegations, but the proximity of Petitioner to the public disclosures and the absence of proof of an alternative explanation that constituted "significant proof" that the *qui tam* action was actually derived from the *Virginia Times* articles.

Petitioner theorizes that he could have obtained his information from the same or different sources than those used by the *Virginia Times* reporter (Petition at 14), but disregards the fact that he had the burden of proof with respect to all necessary jurisdictional facts. (Opinion at 28a, Petitioner's Appendix A.) Petitioner offered no evidence to rebut the clear inference that he had

derived his *qui tam* Complaint from the allegations published in the *Virginia Times*.[1]

According to this Court's Rule 10, "[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Petitioner's first two assignments of error boil down to claims that the district court committed clear error in making jurisdictional factual findings and that the Fourth Circuit misapplied the properly stated standard in *Siller*. As such, Petitioner fails to provide any of the "compelling reasons" that justify a writ of *certiorari*. This case falls within the broad heartland of cases for which a petition for writ of *certiorari* should be rejected.

II. THE ATTORNEYS' FEES AWARD RAISES NO ISSUE OF UNIFORMITY OF FEDERAL LAW AND IS THEREFORE NOT CERTWORTHY

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[1] Having failed to present evidence to support his jurisdictional allegations, Petitioner argues that it should have been clear from the face of the Complaint that his allegations were not actually derived from the *Virginia Times* articles. Petitioner claims that the Complaint contained details not included in the *Virginia Times* articles. However, where "a relator merely adds slight details and variations to a publicly disclosed fraud," the relator's Complaint is nevertheless based upon the public disclosure for purposes of Section 3730(e)(4)(A). *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 50 (D.D.C. 2007).

Contrary to Petitioner's argument, there is nothing "extreme" about the Fourth Circuit's affirmance of the attorneys' fees award. The Fourth Circuit followed settled law, and the law in this area is not the subject of controversy among the circuits. Accordingly, there is no need for this Court to "act now to make the proper rule of law clear for all the Circuits." (Petition at 17.)

A. The Fourth Circuit Applied The Correct Rule Of Law

In reviewing the attorneys' fee award, the Fourth Circuit considered whether Petitioner's FCA claims were "clearly frivolous." That is the standard expressly mandated by the FCA. *See* 31 U.S.C. § 3730(d)(4) ("[T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

The Fourth Circuit defined "clearly frivolous" to mean "no reasonable chance of success." That is the definition Petitioner advocates. (Opinion at 40a, Petitioner's Appendix A; Opening Brief at 46.) It is also consistent with the definition other courts have used in analyzing whether FCA claims are "clearly frivolous." *E.g.*, *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) (stating that the "plaintiff's action must be meritless in the sense that it is groundless or without foundation"); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001) (stating a "claim is

frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify present law"); *United States ex rel. J. Cooper & Assoc., Inc. v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225, 238 (D.D.C. 2006) (stating "A claim is frivolous if it is utterly lacking in legal merit and evidentiary support.").

Reviewing the record through the "no reasonable chance of success" lens, the Fourth Circuit concluded that the district court did not abuse its discretion in finding that Petitioner's "claim that he qualified as a proper relator clearly had no reasonable chance of success." (Opinion at 40a, Petitioner's Appendix A.) Petitioner was not a proper relator because he lacked independent and direct knowledge of any false claims by Respondents. The district court's decision was not an abuse of discretion in these circumstances. *See Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir. 1986) (recognizing that the appellate court "has a duty to affirm an [attorneys' fees] award which falls within the district court's broad discretion").

B. The Petition Seeks This Court's Review Of Factual Determinations, Which Does Not Merit A Writ Of *Certiorari*

As with his first and second assignments of error, Petitioner's real objection is not with the rule of law applied by the Fourth Circuit in reviewing the attorneys' fee award, but with its factual determinations regarding Petitioner's allegations. The assertion of erroneous factual determinations by

the lower court is insufficient to merit a writ of *certiorari*. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating "[w]e do not grant a *certiorari* to review evidence and discuss specific facts"); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (dismissing cross petition of writ as improvidently granted where the Court was "presented primarily with a question of fact, which does not merit Court review"); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 537 (1957) (stating "[t]he rule that the Court does not grant *certiorari* to review evidence is a wise rule, indeed indispensable to the work of the Court"). As the Court stated, its review "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) (dismissing writ where it became clear that the only controversy revolved around the sufficiency of the evidence).

The Fourth Circuit's determinations are supported by the record in any event. As observed by both courts below, Petitioner provided no evidentiary support for his allegation that he had direct and independent knowledge that The Cameron Foundation (or any Respondent) submitted a false bill or statement to the Government. (Opinion at 32a, Petitioner's Appendix A; Opinion at 78a, Petitioner's Appendix C.) Indeed, Petitioner could not specify even a single false bill or statement that any Respondent submitted, whether based on direct or indirect knowledge. When given the opportunity to proffer such evidence at the hearing

on the motions to dismiss—his suit hanging in the balance—Petitioner admitted he could not.

If anything, Petitioner's evidence affirmatively demonstrated that his allegations of direct and independent knowledge were clearly frivolous. For instance, Petitioner admitted that he ceased practicing medicine at SRMC in 2003. Petitioner's contention that he had direct and independent knowledge of allegedly false claim submittals at SRMC "through March of 2005," was thus patently false. (Opinion at 31a, Petitioner's Appendix A); *Rockwell*, 549 U.S. at 475-76 (holding relator incapable of having direct and independent knowledge of facts that transpired after he left the defendant's employ).

In sum, the lower courts' frivolity findings are not clearly erroneous given this record. They present no grounds worthy of a writ of *certiorari*. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944) (stating that it "must be a strong case in which this court will set aside these concurrent findings of two courts"). *See also* Sup. Ct. R. 10 (stating that where the "asserted error consists of erroneous factual finding or misapplication of a properly stated rule of law," the Court will rarely grant a writ of *certiorari*).

CONCLUSION

For the forgoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted.

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